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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1987

WESTINGHOUSE ELECTRIC CORPORATION
Petitioner,

v.

LAL R. BHAYA, ET AL.,
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

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QUESTIONS PRESENTED

1. May an appellate court reinstate a jury verdict for plaintiffs, who have alleged intentional age discrimination in employment but have not presented any affirmative evidence refuting defendant's explanation for its action, on the sole ground that the jury was free to disbelieve the defendant's witnesses?

2. Does the appellate court's adoption of plaintiffs' argument that defendant could have made a different business decision, *i.e.*, laid off younger employees and transferred their job duties to plaintiffs, impermissibly shift the burden to defendant to *disprove* plaintiff's claim of intentional age discrimination?

3. In a case involving a large scale and continuing reduction of the work force, may plaintiffs carry their initial burden of establishing a *prima facie* case of employment discrimination simply by presenting evidence that they were laid off from jobs for which they were qualified while younger employees were treated more favorably?

TABLE OF CONTENTS

	Page
QUESTIONS PRESENTED	i
TABLE OF AUTHORITIES	iv
OPINIONS BELOW	1
JURISDICTION	2
STATUTORY PROVISIONS INVOLVED	2
STATEMENT OF THE CASE	3
REASONS FOR GRANTING THE WRIT	11
I. THE DECISION BELOW IS IN APPARENT CONFLICT WITH SEVERAL DECISIONS OF THIS COURT	11
A. The Court Below Erred In Not Requiring Plaintiffs to Produce Affirmative Evidence of Age Discrimination	11
B. The Court Below Applied an Incorrect Standard for Assessing the Sufficiency of the Evidence	13
C. The Court Below Erroneously Placed the Burden of Proof on the Defendant	15
D. The Court Below Misconstrued the Scope of the ADEA	18
E. The Court Below Erroneously Relied Upon Internally Inconsistent Testimony	19
II. THE PRINCIPLES STATED IN THE DECISION BELOW CONFLICT WITH ANALYSES USED BY OTHER CIRCUITS	21
A. The Decision Below Conflicts With Decisions of the Second Circuit Which Require Presentation of Affirmative Evidence	21

TABLE OF CONTENTS—*(Continued)*

Page

B. The Decision Below Conflicts with Decisions of the First Circuit Which Require a Plaintiff to Show the Defendant's Explanation Is a Pretext for Discrimination 23

C. The Standard Used by the Third Circuit for a *Prima Facie* Case of Discrimination in a Reduction In Force Case Conflicts with that Used by Other Circuits 24

CONCLUSION 27

APPENDIX:

OPINION OF COURT OF APPEALS, November 2, 1987 ..... A-1

COURT OF APPEALS ORDER DENYING DEFENDANT'S PETITION FOR REHEARING, November 20, 1987 ..... A-11

OPINION AND ORDERS OF DISTRICT COURT, December 30, 1986 ..... A-12

TABLE OF AUTHORITIES

Cases: Page

Allison v. Western Union Telegraph Co., 680 F.2d 1318 (11th Cir. 1982) 26

Anderson v. Bessemer City, 470 U.S. 564 (1985) 19, 20

Anderson v. Liberty Lobby, Inc., ____ U.S. ____, 106 S.Ct. 2505 (1986) 12, 13, 15, 21, 22

Brady v. Southern Railway Company, 320 U.S. 476 (1943) 12

Chipollini v. Spencer Gifts, Inc., 814 F.2d 893 (3d Cir. 1987) 23, 24

Dea v. Look, 810 F.2d 12 (1st Cir. 1987) 23

Dominic v. Consolidated Edison Co. of New York, Inc., 822 F.2d 1249 (2d Cir. 1987) 22

Fireman's Fund Insurance Company v. Vidafreeze Corporation, 540 F.2d 1171 (3d Cir. 1976), *cert. denied*, 429 U.S. 1053 (1977) 14

Furnco Construction Corporation v. Waters, 438 U.S. 567 (1978) 12, 15, 18

Holley v. Sanyo Manufacturing, Inc., 771 F.2d 1161 (8th Cir. 1985) 25

Irvin v. Airco Carbide, ____ F.2d ____, 45 FEP Cases 1501 (6th Cir. 1987) 23

Jackson v. University of Pittsburgh, 826 F.2d 230 (3d Cir. 1987) 24

Jang v. Biltmore Tire Co., Inc., 797 F.2d 486 (7th Cir. 1986) 22

LaGrant v. Gulf & Western Mfg. Co., Inc., 748 F.2d 1087 (6th Cir. 1984) 25

Martin v. Citibank, N.A., 762 F.2d 212 (2d Cir. 1985) 22

TABLE OF AUTHORITIES—*(Continued)*

Cases: Page

Massarsky v. General Motors Corp., 706 F.2d 111 (3d Cir.), *cert. denied*, 464 U.S. 937 (1983)... 25

Matthews v. Allis-Chalmers, 769 F.2d 1215 (7th Cir. 1985)..... 26

McDonnell Douglas Corp. v. Green, 411 U.S. 792 (1973)..... 15

Sorba v. Pennsylvania Drilling Co., Inc., 821 F.2d 200 (3d Cir. 1987)..... 24

Texas Department of Community Affairs v. Burdine, 450 U.S. 248 (1981)..... 16, 17

U.S. Postal Service Board of Governors v. Aikens, 460 U.S. 711 (1983)..... 24

White v. Vathally, 732 F.2d 1037 (1st Cir.), *cert. denied*, 469 U.S. 933 (1984)..... 23

Williams v. General Motors Corp., 656 F.2d 120 (5th Cir. 1981), *cert. denied*, 455 U.S. 943 (1982)..... 26

STATUTES

28 U.S.C. §1254(1)..... 2

28 U.S.C. §1331..... 2

29 U.S.C. §621 *et seq.*..... 2, 3

RULES

28 U.S.C. Fed. R. Civ. P. 50(b)..... 2

STATEMENT PURSUANT TO RULE 28.1 RULES OF THE SUPREME COURT OF THE UNITED STATES

Pursuant to Rule 28.1 of the Rules of the Supreme Court of the United States, the following list represents the non-wholly-owned subsidiaries and affiliates of Petitioner, Westinghouse Electric Corporation.

CMW Sistemas, Ltda.
CMW Equipamentos, Ltda.
Cemac Westinghouse Pty. Ltd.
China Industry Services Co., Ltd.
Compagnie des Dispositifs Semiconducteurs Westinghouse
Computer Aided Training Company, Incorporated
Contradores Electricos, C.A.
Electro-Fanal S.A.
Electronic Office Centers of America Corporation
Elektrik Technizati Imalti Tesisati, A.S.
Eletrocontroles Villares, Ltda.
Eletromar Industria Eletrica Brasileira, S.A.
Email Limited
Ercole Marelli & Company, S.p.A.
Escorts, Ltd.
Franco Tosi S.p.A.
Galileo Argentina, C.I.S.A.
Galileo Uruguaya, S.A.
Horizon International Television, Inc.
Hyosung Heavy Industries, Ltd.
IEM S.A.
Iberatomica
Industria IEM, S.A. de C.V.
Industrias Electronicas, S.A.
Infrared Fiber Systems, Inc.
Innovative Technologies Incorporated
Integrated Communication Systems Inc.
Integrated Power Corporation
Industry Services Company of Saudi Arabia, Ltd.
Korea Industry Services Co., Ltd.
Maihak A.G. (H)
Mecanica Pesada, S.A.
Mex Control, S.A. de C.V.
Micros Systems Inc.
Mictron, Inc.
Mitsubishi Electric Corporation
Mitsubishi Nuclear Fuel Co., Ltd.
Mitsubishi-Westinghouse Electric SGC, Ltd.
New Trends Corporation
Perceptics
Porta Pack Corporation
Powerex, Inc.
Project Funding Corporation
Schneider S.A.
Serratosa & Castello, S.A.
Siam di Tella, Ltd. (Argentina)
Siam di Tella, Ltd. (Uraguay)
Silectra, S.A. de C.V.
Siliconix, Inc.
Speech Plus
Theta J Corporation
Toshiba Westinghouse Electronics Corporation
Transformadores de Distribucion Trade, S.A.
Transformadores TPL S.A.
Turbine Metal Technologies, Inc.
Tyree Industries Limited
Tyree-Power Construction Limited
United Western Technologies Corp.
Vektron S.A.
WM Power Products, Inc.
W. S. Insulators
Westinghouse-Airship Industries, Inc.
Westinghouse Asia Controls Corp.
Westinghouse Electric Supply Company of Saudi Arabia
Westinghouse Electro Metalurgicas C.A.
Westinghouse E-Mail, Ltd.
Westinghouse Motor Company
Westinghouse, S.A.
Westinghouse Saudi Arabia Ltd.
Westralian Transformers Pty. Limited
Westinghouse Projectos Electricos, S.A.
WEXICO Systems and Services, Ltd.

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

Petitioner, Westinghouse Electric Corporation ("Westinghouse"), prays that a writ of certiorari be issued to review the November 2, 1987 judgment of the United States Court of Appeals for the Third Circuit.

OPINIONS BELOW

The opinion of the Court of Appeals is reported at 832 F.2d 258 (3d Cir. 1987). The decision of the District Court has not been published.

JURISDICTION

The judgment of the Court of Appeals was entered on November 2, 1987. A timely petition for rehearing was denied on November 30, 1987, and this petition is being filed within ninety days of that denial.

Under 28 U.S.C. §1254(1), this Court has jurisdiction to review the judgment of the Court of Appeals. Subject matter jurisdiction existed in the District Court pursuant to 28 U.S.C. §1331 and 29 U.S.C. §626.

THE STATUTORY PROVISIONS INVOLVED

Title 28, United States Code
Federal Rule of Civil Procedure 50(b)

(b) Motion for Judgment Notwithstanding the Verdict. Whenever a motion for a directed verdict made at the close of all the evidence is denied or for any reason is not granted, the court is deemed to have submitted the action to the jury subject to a later determination of the legal questions raised by the motion. Not later than 10 days after entry of judgment, a party who has moved for a directed verdict may move to have the verdict and any judgment entered thereon set aside and to have judgment entered in accordance with the party's motion for a directed verdict; or if a verdict was not returned such party, within 10 days after the jury has been discharged, may move for judgment in accordance with the party's motion for a directed verdict. A motion for a new trial may be joined with this motion, or a new trial may be prayed for in the alternative. If a verdict was returned the court may allow the judgment to stand or may reopen the judgment and either order a new trial or direct the entry of judgment as if the requested verdict had been directed. If no verdict was returned the court may direct the entry of judgment as if the requested verdict had been directed or may order a new trial.

Title 29, United States Code, Labor
§623 Prohibition of Age Discrimination

(a) It shall be unlawful for an employer —

(1) to fail or refuse to hire or discharge any individual or otherwise discriminate against any individual with respect to his compensation, terms, conditions or privileges of employment, because of such individual's age. . . .

STATEMENT OF THE CASE

On November 2, 1984, plaintiffs/respondents, Lal R. Bhaya, Richard Carner, William J. Haessler, Henry A. Parzick and Earle Williams, filed a complaint in the United States District Court for the Eastern District of Pennsylvania, alleging that their former employer, defendant/petitioner Westinghouse, had violated their rights as secured by the Age Discrimination in Employment Act ("ADEA"), 29 U.S.C. §621 *et seq.*

Plaintiffs were formerly employed as Negotiation Engineers ("NEs") in the Availability Assurance Department ("AA Dept.") and Marketing Department ("Marketing Dept.") of the Combustion Turbine Systems Division (the "division") at the Westinghouse facility in Concordville, Pennsylvania. The terms and conditions of plaintiffs' employment were governed by a collective bargaining agreement.

In November of 1982, officials of the corporation notified plaintiffs that the company was eliminating the job progression of NEs as part of a workforce reduction compelled by the economic difficulties of the division. Under the collective bargaining agreement, plaintiffs were not eligible to "bump" other employees in other job progressions. Consequently, they were "put up for disposition," which meant they were to be laid off if they were unable to relocate elsewhere in the corporation.

Because plaintiffs were not able to find other employment within Westinghouse, they were laid off effective December 17, 1982.

On October 31, 1985, Westinghouse filed a motion for summary judgment, alleging that plaintiffs could not establish a *prima facie* case of age discrimination. The district court judge never ruled upon the motion. In a bifurcated trial which ended on November 19, 1985, the jury found in favor of plaintiffs and awarded them back pay, front pay and liquidated damages. On December 23, 1985, the district court judge entered judgment in favor of plaintiffs and against the defendant in the following amounts: Lal Bhaya, $438,345.26; Henry Parzick, $202,658.29; William Haessler, $363,539.21; Earle Williams, $247,166.00; and Richard Carner, $315,421.19.

Defendant filed timely post-trial motions under Federal Rules of Civil Procedure 50(d) and 59, requesting a judgment notwithstanding the verdict ("j.n.o.v."), or in the alternative, a new trial. Defendant also filed a motion to amend the judgment.

On December 31, 1986, the Honorable Joseph S. Lord, III entered an order and opinion, granting Westinghouse's motion for a j.n.o.v. *See* attached Appendix at A-12-A-27. He did not address or decide any of the issues raised by defendant's motion for a new trial. He also entered an order dismissing as moot all other outstanding motions. (A-28.)

While plaintiffs' theory of the case changed several times during the course of the trial, counsel argued to the jury that Westinghouse committed age discrimination because it could have laid off younger engineers with less seniority in two other job progressions and in other seniority units, the Availability Assurance Engineers ("AAEs") and Applications Engineers ("AEs")[1]

1. Four of the plaintiffs claimed that they could do the work of AAEs while one of the plaintiffs, Mr. Bhaya, claimed he could do the

and transferred their duties to the older and more senior employees working as NEs. At trial, the plaintiffs did not dispute that the division was losing money or that it was necessary to lay off employees.

The District Court Judge granted a j.n.o.v. because plaintiffs failed to present (1) affirmative evidence that the elimination of the NE job progression was the result of intentional age discrimination, or (2) evidence directly refuting the legitimate non-discriminatory reasons offered by defendant for its action. (A-22-A-23.) The trial court reasoned that plaintiffs' showing that younger AAEs and AEs were treated more favorably was not sufficient to support an inference of age discrimination in light of defendant's articulation of non-discriminatory reasons for the elimination of the NE job progression. (A-22.) He also concluded that the mere fact that plaintiffs may have been qualified to do the work of the other engineers did not prove that age was a determing factor in the elimination of their job position. (A-24). Even assuming there was sufficient evidence to persuade a reasonable factfinder that plaintiffs could have assumed the job duties of the AAEs and AEs, such evidence would not establish intentional age discrimination on the part of Westinghouse.[2]

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work of the AEs. The opinion of the district court judge referred to the AEs as "general engineers."

2. As the trial judge noted, plaintiffs in fact gave contradictory testimony about whether they could do the work of the other engineering job progressions. For example, all of the plaintiffs initially testified that the jobs of the NEs and the AAEs (or, in the case of Mr. Bhaya, the AEs) were the same and that the job duties of the AAEs had belonged to the NEs before the creation of the AAE job progression. (119a; 238a-240a; 350a-352a; 414a; 390a-351a.) Nonetheless, on cross-examination, all of the plaintiffs admitted that, at the time of their layoffs, there were differences in the duties of the two jobs. (190a; 238a-240a; 262a-263a; 360a; 416a; 390a-393a.)

Plaintiffs also gave conflicting testimony about what happened to their work after their layoffs. None of the plaintiffs knew who, if

In deciding the motion for a j.n.o.v., the trial judge rejected the testimony of plaintiffs' "expert," Dr. Richard Andrulis, because it was internally inconsistent. Andrulis described himself as an "industrial management consultant." (280a.)[3] Over defendant's objection, he was allowed to testify as an expert statistician.

Dr. Andrulis conceded that of the approximately 105 individuals laid off at the division, 50 were over the age of 40 while 55 were under the age of 40. (316a). He agreed that, an employee younger than 40 years of age was more likely to be terminated than one older than 40 regardless of whether he or she were an NE or an AAE.[4] (303a; 461a; 472a-473a.) Nonetheless, he concluded that age was a determining factor in the layoff of plaintiffs. (320a.) He reached this conclusion by comparing the number of persons over 40 years of age who were laid off in each of nine job progressions. (315a-316a.) Dr. Andrulis found significant the fact that a higher percentage of members of the NE job progression were terminated than occurred in some other job

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NOTES *(Continued)*

anyone, did their work after their departure. At most, some of them could testify that at the time of their layoffs they turned over some remaining work to younger AAEs or AEs. There was testimony by an AAE that the jobs were not the same and the AAE job did not change after the NEs left. (842a, 844a.) There was also testimony that the sales managers, not the AAEs, absorbed some remaining duties of the NEs. (740a-741a).

3. This is a reference to the record below, as submitted to the Court of Appeals. All such references include a number, followed by a lowercase "a." By contrast, the references to the Appendix to this petition include an uppercase "A" folowed by a number, *e.g.*, "A-1."

4. Dr. Andrulis also acknowledged that his conclusions only applied to the four plaintiffs who compared themselves to the AAEs. Since Mr. Bhaya testified that his work was given to the AEs, the study done by Andrulis did not apply to Bhaya and therefore could not be a basis for reversing the j.n.o.v. regarding his claim of age discrimination. (473a.)

progressions. (318a.)[5] Dr. Andrulis agreed that the statistical discrepancy noted by him in comparing the layoffs of AAEs with NEs, which allegedly showed age discrimination, could have been rectified if the company had terminated two AAEs *over the age of 40*. (480-481a.) Thus, under Andrulis' analysis, Westinghouse should have laid off additional *older* employees in order to avoid a finding of age discrimination. The District Court judge described this approach as nonsensical. (A-25).

Dr. Andrulis opined that Westinghouse should have laid off the AAEs rather than the plaintiffs because plaintiffs had more seniority. (324a.) He admitted, however, that he had not read the collective bargaining agreement, which mandates a seniority system based on job progression, not plant-wide seniority. (343a-344a). On cross-examination, Dr. Andrulis also acknowledged that when a company decides to reduce its work force, the nature of the layoff will be based upon ". . . many different business criteria." (435a.)

In his written report, Dr. Andrulis observed:

> The business justification for the elimination of the job family negotiation engineer may in fact be a moot point. What is cited by the company as a business necessity may well be justifiable; the need for the skills exhibited by the negotiation engineer was then and is now not necessary.

(461a.)[6]

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5. The explanation for this fact is, of course, quite simple: the job progression was eliminated. The analysis done by Dr. Andrulis overlooked this obvious point.

6. This concession by plaintiff's expert belies the statement in the Third Circuit opinion that plaintiffs disputed defendant's contention that unfavorable economic conditions and the expendability of the duties performed by plaintiffs necessitated the elimination of the NE job progression. (A-5).

The District Court judge granted j.n.o.v. in part because plaintiffs failed to show that defendant's explanation for the elimination of the NE job progression was a pretext for age discrimination. James Borden, Acting Manager of the AA Dept., testified that he and Reginald McIntyre, Manager of the Marketing Dept., made the initial decision to eliminate the position of NE. (720a, 721a.) By the summer of 1982, the division was in serious economic trouble because it had not received any new orders for turbines during that year. Therefore, management officials at Concordville made two business judgments: (1) that the demand for new equipment would never again be as great and (2) the demand for servicing of equipment would also decrease. (706a-707a.) As a result, management believed that it must not only reduce the work force but also restructure the organization. (708a.) New sales of turbines did not occur again until 1985. From 1982 to 1985, the work force at the Concordville facility was reduced from 650 to 236 and was below that at the time of trial[7] (751a.)

In the summer of 1982, employees throughout the division were laid off, including the five NEs with the least seniority[8] and AAEs with the least seniority. (708a, 712a, 713a, 715a.) Because business did not improve and further workforce reductions were needed, McIntyre and Borden decided to eliminate the NE job progression.[9] They believed the operation could function

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7. The Concordville plant has now been closed. In the process, all remaining employees were laid off except a small number who were able to find other positions elsewhere in the company.

8. This group included two who were in their mid-20s, two who were in their 40s, and one who was approximately 52 years old. (714a-715a.)

9. The position of NE was not the only job progression eliminated in the division. Both the project planning function and project material functions were eliminated, resulting in the layoff of twenty-four people. (754a, 756a.)

without the NEs who merely supported the activity of the regional sales managers. (721a-722a.)

Once this decision was made, all the NEs were "put up for disposition," and their rights to other jobs at Westinghouse were determined by the terms of the collective bargaining agreement. (727a.) It is undisputed that, given the work history of the five plaintiffs, when their jobs were eliminated they were not entitled to "bump" any other employees. It is also undisputed that two of the NEs, whose ages were 60 and 44 years, obtained jobs in other divisions of Westinghouse (729a-730a; Exhibit P-8; 37a-41a).

In addition to the fact that the collective bargaining agreement does not allow for the transfer of duties, as more fully discussed below, Borden never considered transferring the duties of the AAEs to the NEs nor laying off some from each job progression because the AAEs were successfully meeting the servicing demands of Westinghouse customers who had already purchased turbine equipment. (731a, 741a-742a).

Borden testified that the jobs of NE and AAE were different. The primary function of the AAE is to provide technical assistance to keep equipment operating in the field at customers' sites, while the primary function of the NE was to assist sales and marketing people, who put together proposal packages to be sold to customers. Chester A. Turnbull, Manager of Salary Labor Relations and Manager of Wage and Salary Administration at Westinghouse, confirmed this view. (616a, 619a, 621a, 622a.)

Turnbull also refuted plaintiffs' claim that the company should have transferred the duties of the AAEs to the NEs and then laid off the AAEs. Mr. Turnbull administered the company's collective bargaining agreement with the salaried union of which plaintiffs were members. He said that the agreement did not permit, without bargaining with the union, the transfer of duties from one job progression to another job progression, if

the transfer necessitated a change in the job description. (604a-606a, 657a.) Since the job descriptions for the two positions are different, they would have to be changed if duties were transferred from the AAEs to the NEs. (666a-667a.) The District Court judge found that plaintiffs' evidence did not refute in any way the defendant's claim that duties could not be transferred from the AAEs (or AEs) to the NEs without changing the job descriptions which would require bargaining with the union to avoid violating the collective bargaining agreement. (A-24.)

The Court of Appeals for the Third Circuit reversed the j.n.o.v. in favor of defendant. The appellate court found that, viewing the evidence in the light most favorable to plaintiffs, they were qualified to do the work done by the AAEs and the AEs. Ignoring provisions of the collective bargaining agreement, the appellate court held that the jury could find that the failure to transfer these duties to the NEs and lay off the younger AAEs and AEs supported a finding of intentional age discrimination. As support for this position, the Court of Appeals relied exclusively upon plaintiffs' testimony regarding their own qualifications and the internally inconsistent testimony of plaintiffs' expert, Dr. Andrulis. According to the appellate court, this evidence together with the possibility that the jury might have disbelieved the explanation given by defendant for the elimination of the NE job progression supported the jury's verdict against Westinghouse. (A-8-A-10.) The Third Circuit reached this conclusion notwithstanding the testimony of plaintiffs' own expert that what was cited by the company as a business necessity may well be justifiable (461a) and the fact that plaintiffs did not argue that their job should not have been eliminated, but only that other duties should have been transferred to them.

REASONS FOR GRANTING THE WRIT

Among the many important cases competing for this Court's attention, this case stands out in its significance to the administration of civil justice in the federal court system for the reasons that follow.

I. THE DECISION BELOW IS IN APPARENT CONFLICT WITH SEVERAL DECISIONS OF THIS COURT.

A. The Court Below Erred in Not Requiring Plaintiffs to Produce Affirmative Evidence of Age Discrimination.

One of the reasons the District Court judge granted defendant's motion for a j.n.o.v. was because plaintiffs did not submit any affirmative evidence of intentional age discrimination.

The Court of Appeals for the Third Circuit reversed the district court judge, reasoning that:

> We are reviewing a general verdict. It is impossible to tell whether the plaintiffs' evidence persuaded the jury that the employer considered age in addition to the relative expendability of the particular services being performed by the plaintiffs or whether the jury simply disbelieved the defendant's explanation for its action. If there is evidence to support either of these possible reasons for the verdict, the district erred in granting judgment notwithstanding the verdict. Viewing the evidence in the light most favorable to the plaintiffs and drawing competing inferences in their favor, we find that the record contains indirect evidence which, if credited, raises an inference of discrimination.

(A-8.)

The Third Circuit also concluded that:

> Because we must resolve all factual issues in favor of the plaintiffs, we must assume that the factfinder did not believe the defendant. "When all legitimate reasons for rejecting an applicant have been eliminated as possible reasons for an employer's actions, it is more likely than not the employer, who we generally assume acts only with *some* reason, based his decision on an impermissible consideration such as (age)."

(A-10, quoting *Furnco Construction Corporation v. Waters*, 438 U.S. 567, 577 (1978), emphasis in the original.)

The reasoning of the Court of Appeals that a j.n.o.v. was not appropriate because the jury could find in favor of plaintiffs based simply on its rejection of the legitimate, non-discriminatory reasons offered by Westinghouse for its decision to eliminate the NE job progression is not consistent with the analysis of this Court found in *Anderson v. Liberty Lobby, Inc.*, ____ U.S. ____, 106 S.Ct. 2505 (1986). While the *Anderson* decision focuses on the appropriate analysis of motions for summary judgment, the opinion also discusses the standard for determining a motion for a directed verdict, which, in turn, applies to a motion for a j.n.o.v. *Brady v. Southern Railway Company*, 320 U.S. 476, 479-480 (1943).

In rejecting the argument that summary judgment is not appropriate where a party's state of mind is at issue, and a jury might disbelieve the party or its witnesses, the *Anderson* decision cautions:

> We do not understand *Poller*, however, to hold that a plaintiff may defeat a defendant's properly supported motion for summary judgment in a conspiracy or libel case, for example, without offering any concrete evidence from which a reasonable juror could return a verdict in his favor and by merely asserting that the jury might, and legally could,

> disbelieve the defendant's denial of a conspiracy or of legal malice. . . . As we have recently said, "discredited testimony is not [normally] considered a sufficient basis for drawing a contrary conclusion." Instead, *the plaintiff must present affirmative evidence* in order to defeat a properly supported motion for summary judgment.

106 S.Ct. at 2514 (citation omitted; emphasis added).

The reasoning of the Third Circuit in this case that a jury verdict in favor of plaintiffs should stand because the jury may have disbelieved defendant's explanation represents a clear conflict with the requirement of *Anderson* that a party opposing a motion for summary judgment (or j.n.o.v.) come forward with affirmative evidence in support of his position. Accordingly, certiorari should be granted to resolve this conflict.

B. The Court Below Applied An Incorrect Standard for Assessing the Sufficiency of the Evidence.

The reversal of the j.n.o.v. in this case was also based on the erroneous notion that plaintiffs, as the parties opposed to the motion, need only produce some evidence supporting the verdict in their favor. This Court, however, noted in *Anderson*, *supra*, that:

> The mere existence of a scintilla of evidence in support of the plaintiff's position will be insufficient; there must be evidence on which the jury could reasonably find for the plaintiff.

Id. at 2512.

The evidence in this case, as described *supra*, showing intentional age discrimination, was gossamer thin. Viewing the evidence in the light most favorable to plaintiffs, they proved only that they were laid off while younger employees in *other* job progressions were retained to do tasks which plaintiffs claimed they could do also. Because plaintiffs could not "bump" into these

other job progessions, this evidence does not amount to even a scintilla that the elimination of plaintiffs' job position was the result of intentional age discrimination by defendant.

The decision of the Third Circuit also states that a j.n.o.v. is not appropriate so long as plaintiffs' evidence created "an issue of fact." The opinion of the Court of Appeals describes the standard as follows:

> The plaintiffs' evidence was adequate to support an inference, initially a presumption, of discrimination. When the defendant produced evidence of a nondiscriminatory reason, the *presumption* dropped from the case. A permissible *inference* remained, however, to create an issue of fact. In addition, the tetimony of the plaintiffs' expert raised issues of fact with respect to the defendant's asserted reason.

(A-9-A-10, emphasis in the original.)

This position is one long held by the Third Circuit. For example, in *Fireman's Fund Insurance Company v. Vidafreeze Corporation*, 540 F.2d 1171, 1178 (3d Cir. 1976), *cert. denied*, 429 U.S. 1053 (1977), the Court of Appeals wrote:

> . . .[T]he judge attempted to determine the preponderance of the evidence. Apparently, he thought that the verdict should not be allowed to stand unless he could conclude that the jury could "say reasonably that the preponderance favors liability." . . . We have said that a trial judge, when deciding on a motion for a directed verdict or for judgment notwithstanding the verdict, should not determine whether the evidence "preponderates" but must confine himself to ascertaining whether the party against whom the motion is made adduced sufficient evidence to create a jury issue.

540 F.2d at 1178 (citations omitted).

This Court, however, has since stated a contrary rule in *Anderson, supra:*

> The judge's inquiry, therefore, unavoidably asks whether reasonable jurors *could find by a preponderance of the evidence* that the plaintiff is entitled to a verdict. . . .

106 S.Ct. at 2512 (emphasis added).

Accordingly, another significant conflict exists between the analysis of the Third Circuit in this case and principles stated by this Court in *Anderson v. Liberty Lobby, supra.*

C. The Court Below Erroneously Placed the Burden of Proof on the Defendant.

The appellate decision in this case misstates the allocation of proof in an employment discrimination case. The Third Circuit noted that, while the production by defendant of evidence of a non-discriminatory reason eliminated the presumption of discrimination created by plaintiffs' *prima facie* case, "a permissible *inference* remained, however, to create an issue of fact." (A-10, emphasis in the original.) By contrast, the decision of the majority of this Court in *Furnco Construction Corporation v. Waters, supra*, specifically states: "*To dispel the adverse inference* from a *prima facie* showing under *McDonnell Douglas*, the employer need only 'articulate some legitimate non-discriminatory reason for the employee's rejection'." 438 U.S. at 578 (emphasis in the original).

The decision of the Third Circuit also rests on the incorrect premise that, under the circumstances of this case, plaintiffs may rely exclusively on the evidence used to establish a *prima facie* case to rebut defendant's articulation of a non-discriminatory reason and meet its ultimate burden of proving intentional discrimination by the defendant. (A-8-A-10.) This position conflicts with language in *Furnco, supra*, and in *McDonnell Douglas*

Corp. v. Green, 411 U.S. 792, 804-805 (1973), which emphasizes that a plaintiff must come forward with evidence showing that the defendant's explanation is not credible.

While a plaintiff may bear his or her ultimate burden of proving intentional discrimination by relying upon a particularly compelling *prima facie* case and the effective cross-examination of defendant's witnesses,[10] this avenue is not available here for two reasons. First, the opinion of the Court of Appeals does not contend that plaintiffs discredited defendant's explanation through effective cross-examination; rather, it simply posits that the jury may have disbelieved this explanation. Second, if plaintiffs made out a *prima facie* case at all, it was a very weak one.

As this Court said in the *Burdine* decision, "*McDonnell Douglas* teaches that it is the plaintiff's task to demonstrate that similarly situated employees were not treated equally." *Id.* at 258. Plaintiffs' *prima facie* case was weak because they did not show that similarly situated younger employees were treated more favorably. They did not present any evidence, other than their own testimony, to support their contention that they were qualified to do the work of the AAEs (or, in the case of Mr. Bhaya, the AEs).

Also, under the terms of the collective bargaining agreement which governed plaintiffs' employment at defendant Westinghouse, the NEs and the AAEs were not "similarly situated." Each progression represented a different job involving different skills and provided a different line of seniority. (594a.) The NEs were in the Marketing Department while the AAEs were in the Availability Assurance Department. Therefore, plaintiffs did not establish that they were similarly situated to the

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10. *Texas Department of Community Affairs v. Burdine*, 450 U.S. 248, 255, n. 10 (1981).

younger persons to whom they compared themselves.[11]

The standard applied by the Third Circuit for determining if plaintiffs carried their ultimate burden of proving intentional age discrimination by showing that defendant's explanation was pretextual does not conform to the standard used by this Court.

This court noted in *Texas Department of Community Affairs v. Burdine, supra,* that once defendant has articulated some legitimate, non-discriminatory reason for its action,

> the plaintiff must then have an opportunity to prove by a preponderance of the evidence that the legitimate reasons offered by the defendant were not its true reasons, *but were a pretext for discrimination.*

450 U.S. at 253 (emphasis added).

In reversing the j.n.o.v., the Court of Appeals did not point to any evidence from which a reasonable trier of fact could conclude that defendant's explanation for the elimination of the NE job was *a pretext for age discrimination*. Instead, the appellate court reasoned that, if the jury disbelieved the defendant's explanation for the elimination of plaintiffs' job position, the defendant's ". . .actions remain unexplained, . . .[and] it is more likely than not that such actions were based on an illegal discriminatory criterion such as age." (A-9.) This position suggests that a plaintiff may carry his or her ultimate burden of proving intentional discrimination by merely arguing to the jury that defendant's witnesses should not be credited.

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11. Moreover, two of the plaintiffs, Haessler and Carner, based their claims of age discrimination on the allegation that what remained of their duties were given to two AAEs who themselves were in the protected class (ages 47 and 50) and were less than seven years younger. Therefore, in the case of these two plaintiffs, their alleged "replacements" were not sufficiently younger to permit an inference of age discrimination.

By finding that the plaintiffs could carry their burden through such a minimal showing, the Third Circuit has actually placed the burden on defendant to disprove plaintiffs' claim. This position contradicts the principles stated by this Court in numerous opinions involving employment discrimination claims.

D. The Court Below Misconstrued the Scope of the ADEA.

In its decision in this case, the Court of Appeals cites the decision of this Court in *Furnco Construction Corporation v. Waters*, 438 U.S. 567 (1978); however, its reasoning is at complete odds with the principles set forth in *Furnco*. As the decision of the Court of Appeals notes, plaintiffs' case rested upon a theory that Westinghouse *could have maintained* an adequate work force by laying off engineers in all three job progressions according to seniority and transferring the duties of other job classifications to the older and more senior NEs. (A-3.)

This theory, which was approved by the Third Circuit, conflicts with language of this Court cautioning that the federal statutes prohibiting employment discrimination, including the ADEA, do not permit a court to substitute its business judgment for that of the employer. The *Furnco* decision notes:

> [I]t is apparent that the burden which shifts to the employer is merely that of proving that he based his employment decision on a legitimate consideration, and not an illegitimate one such as race. To prove that, he need not prove that he pursued the course which would both enable him to achieve his own business goal *and* allow him to consider the *most* employment applications. Title VII prohibits him from having as a goal a workforce selected by any prescribed discriminatory practice, but it does not impose a duty to adopt a hiring procedure that maximizes hiring of minority employees.

Id. at 577-578.

Contrary to the clear mandate of this Court, the decision of the Third Circuit in this case condones the view that a jury is entitled to hold an employer liable for age discrimination simply because it *could* have made a different business decision which would have favored plaintiffs. The use of this reasoning is particularly pernicious in this case. Plaintiffs' employment at Westinghouse was governed by a collective bargaining agreement, and under its terms plaintiffs could not "bump" employees in other job progressions. The Third Circuit opinion in this case endorses plaintiffs' contention that they should have been given the duties of other job progressions while the employees in those job positions were laid off. In effect, the message of the Court of Appeals is that, to avoid liability under the ADEA, Westinghouse should have breached the spirit, if not the letter, of the collective bargaining agreement because transferring job duties, as advocated by plaintiffs, would effectuate the "bumping" prohibited by the contract.

E. The Court Below Erroneously Relied Upon Internally Inconsistent Testimony.

The appellate decision in this case relies heavily upon the testimony of plaintiffs' expert. That testimony was both nonsensical and internally contradictory. The Third Circuit decision selectively cites portions of Andrulis' testimony as evidence supporting the jury's verdict without acknowledging the contradictory statements made by this alleged expert.

The reliance of the Court of Appeals on the internally inconsistent testimony of plaintiffs' expert is contrary to principles stated by the Court in *Anderson v. Bessemer City*, 470 U.S. 564 (1985). At issue in the *Bessemer City* decision was whether the Court of Appeals had erred in holding that the district court's finding of sex discrimination was clearly erroneous

under Federal Rule of Civil Procedure 52(a). The Court noted that a "reasonable factfinder" will not credit internally inconsistent testimony. *Id.* at 575.

The decision of the Third Circuit also mischaracterizes the testimony of Dr. Andrulis in several important respects. For example, the panel incorrectly states that Andrulis "opined that the plaintiffs were qualified to perform the remaining tasks in other job progressions and that the tasks could have been transferred without a change in plaintiffs' job description." (A-6.) Initially, Andrulis testified, based on four job descriptions, two for AAEs and two for NEs, that the two jobs had similar responsibilities and requirements. (323a-324a.) However, that information was elicited only for purposes of supporting his contention that Westinghouse should have laid off workers on a "plantwide" basis according to seniority. In attempting to rehabilitate Dr. Andrulis on redirect examination, plaintiffs' attorney asked him a series of leading questions to which he answered affirmatively, suggesting that the duties of the two jobs could be interchanged.[12] (484a-488a.)

Dr. Andrulis was never asked nor did he testify about whether the remaining tasks could be transferred without a change in the job description of the NEs. This was a pivotal issue in the case because Chester Turnbull, Manager of Salary Labor Relations and Manager of Wage and Salary Administration at Westinghouse, testified that the collective bargaining agreement did not

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12. Any testimony about plaintiff's qualifications would not have been within the scope of Andrulis' expertise. Plaintiffs offered him as an expert in "the area of industrial management and statistics" (295a), not as an expert on the qualifications of plaintiffs to do engineering jobs at Westinghouse. Similarly, Dr. Andrulis was not qualified to testify about the jobs remaining at Westinghouse. Indeed, he admitted that he did not do a "formal job analysis" of the AAE position and that his only knowledge of the skills necessary for the NEs and AAEs was based on reading the four job descriptions offered as exhibits by plaintiffs. (342a.)

allow a transfer of duties from one job progression to another if the transfer necessitated a change in the job description. Any change in the job description of the AAEs would require bargaining with the union. (604a-606a, 657a.) Mr. Turnbull explained why he believed that the job descriptions of the NEs would have to be changed if they were to assume duties of the AAEs (664a-675a), and his testimony is uncontradicted.

By contrast, Dr. Andrulis admitted that he did not read the collective bargaining agreement. (343a-344a.) When defense counsel questioned Andrulis about the bumping provisions of the collective bargaining agreement, he said: "I am not that technically qualified really to respond to that." (438a.) Indeed, plaintiffs' attorney argued that Andrulis ". . . was not qualified as an expert in labor relations or on contracts of Westinghouse." (439a.)

The Third Circuit did not act as a "reasonable factfinder" in basing its reversal of the j.n.o.v. in part on internally inconsistent and therefore inherently unreliable testimony. Also, it erred grievously in mischaracterizing the evidence, and, in effect, invented evidence to support plaintiff's case.

II. THE PRINCIPLES STATED IN THE DECISION BELOW CONFLICT WITH ANALYSES USED BY OTHER CIRCUITS.

A. The Decision Below Conflicts with Decisions of the Second Circuit Which Require Presentation of Affirmative Evidence.

In reversing the j.n.o.v. in this case, the Court of Appeals held that the jury verdict in favor of plaintiffs should stand even though they did not produce any affirmative evidence of age discrimination because the jury may have disbelieved the explanation given by defendant. Not only does this analysis conflict with the reasoning of this Court in *Anderson v. Liberty Lobby*,

Inc., ____U.S. ____ , 106 S.Ct. 2505 (1986), as discussed previously in this petition, it directly conflicts with that of the Second Circuit in *Martin v. Citibank, N.A.*, 762 F.2d 212 (2d Cir. 1985).

In *Martin*, the Court of Appeals for the Second Circuit affirmed a j.n.o.v. in favor of defendant in a race discrimination case because the plaintiff had failed to produce affirmative evidence refuting defendant's explanation for why plaintiff and other black employees were selected to be polygraphed during an investigation of missing funds at the bank. Since evidence contradicting the polygrapher's claim that he did not know the race of employees at the time he selected them for polygraphing was absent, the Second Circuit found that the drawing of any adverse inference would constitute impermissible speculation by the jury. *Id.* at 217-218. A jury may not base a verdict solely on its disbelief of the testimony of one party's witnesses. *Id. See also Dominic v. Consolidated Edison Co. of New York, Inc.*, 822 F.2d 1249, 1255 (2d Cir. 1987).[13]

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13. The reasoning of the Third Circuit in this case also conflicts with the analysis of the Seventh Circuit in *Jang v. Biltmore Tire Co., Inc.*, 797 F.2d 486 (7th Cir. 1986). Citing one of its earlier decisions, the Seventh Circuit observed:

> That is not to say, however, that a plaintiff can avoid a directed verdict in any ADEA case by arguing the defendant's explanation is unworthy of credence. A plaintiff must do more than merely argue that the jury might have chosen to disbelieve all of the defendant's evidence. To avoid a directed verdict, a plaintiff must offer substantial evidence to support the argument.

Id. at 490.

B. The Decision Below Conflicts with Decisions of the First Circuit which Require a Plaintiff to Show that Defendant's Explanation Is a Pretext for Discrimination.

The United States Court of Appeals for the First Circuit has held that a plaintiff suing for employment discrimination may not prevail by merely refuting the non-discriminatory reason offered by defendant. In order to prove intentional discrimination, a plaintiff must prove by a preponderance of the evidence that the legitimate reasons offered by defendants were *a pretext for discrimination*. Plaintiff must do more than question the factual underpinnings of the defense; he must show specifically that the explanation is a pretext for age discrimination. *Dea v. Look*, 810 F.2d 12, 15 (1st Cir. 1987), citing *White v. Vathally*, 732 F.2d 1037, 1042 (1st Cir.), *cert. denied*, 469 U.S. 933 (1984). *See also Irvin v. Airco Carbide*, ____ F.2d ____, 45 FEP Cases 1501, 1503 (6th Cir. 1987) ("Disputation of the facts underlying [defendant's] legitimate business reason . . . is not sufficient to carry [plaintiff's] burden").

The decision of the Third Circuit in this case reinstated the verdict in favor of plaintiffs even though the record does not contain any evidence showing that defendant's explanation for the elimination of the NE job progression was a pretext for age discrimination. Indeed, as the opinion of the District Court judge pointed out, plaintiffs did not introduce any evidence refuting the explanation given by defendant. In fact, portions of their own testimony as well as that of the expert support the reasons articulated.

The decision in this case follows a series of erroneous decisions by the Third Circuit reversing grants of summary judgment in favor of defendants in employment discrimination cases on the ground that plaintiffs' evidence raises a question about the consistency of defendant's explanation. In *Chipollini v. Spencer Gifts*,

Inc., 814 F.2d 893, 898 (3d Cir. 1987), the Third Circuit explicitly found that a plaintiff may prevail "by means of indirect proof that the employer's reasons are pretextual without presenting evidence specifically relating to age." *See also Sorba v. Pennsylvania Drilling Co., Inc.*, 821 F.2d 200, 205 (3d Cir. 1987); *Jackson v. University of Pittsburgh*, 826 F.2d 230, 235 (3d Cir. 1987).

C. The Standard Used by the Third Circuit for a *Prima Facie* Case of Discrimination in a Reduction in Force Case Conflicts with that Used by Other Circuits.

The Court of Appeals reversed the grant of a j.n.o.v. in favor of defendant because it found that plaintiffs had established a *prima facie* case of age discrimination. As already noted *supra*, the Third Circuit held:

> The plaintiffs' evidence was adequate to support an inference, initially a presumption, of discrimination. When the defendant produced evidence of a nondiscriminatory reason, the *presumption* dropped from the case. A permissible *inference* remained, however, to create an issue of fact.

(A-9-A-10, emphasis in the original.)

This Court has said that once a case has been tried on the merits, a reviewing court should focus on the ultimate determination of intentional discrimination rather than on whether plaintiff made out a *prima facie* case. *U.S. Postal Service Board of Governors v. Aikens*, 460 U.S. 711, 714 (1983). Nonetheless, this case presents a situation where the existence *vel non* of a *prima facie* case remains an issue as the Court of Appeals held that a jury was entitled to find intentional age discrimination solely on the basis of the evidence constituting the plaintiffs' *prima facie* case. (A-9-A-10.)

This case involved the termination of plaintiffs' employment in the context of a large-scale workforce reduction. The standard applied by the Third Circuit to

establish a *prima facie* case of employment discrimination in this situation does not conform to the standards used in other circuits. In the Third Circuit

> [A] *prima facie* case is easily made out: a plaintiff alleging a discriminatory layoff need show only that he was laid off from a job for which he was qualified while others not in the protected class were treated more favorably.

Id., quoting *Massarsky v. General Motors Corp.*, 706 F.2nd 111 (3d Cir.), *cert. denied*, 464 U.S. 937 (1983).

By contrast, other Court of Appeals have held that, in a reduction-in-force situation, a plaintiff must come forward with *more evidence* of intentional discrimination in order to carry the initial burden of proof represented by the *prima facie* case. For example, the case of *LaGrant v. Gulf & Western Mfg. Co., Inc.*, 748 F.2d 1087 (6th Cir. 1984), concerned an employee of eleven years with a history of receiving excellent performance appraisals, who was laid off by defendant in a reorganization which involved the elimination of seven job positions. Affirming the grant of summary judgment in favor of defendant employer, the Sixth Circuit held:

> When there is a corporate reorganization or reduction in forces, a *prima facie* case is not established when plaintiff does not show that he was replaced by a younger person. The mere termination of a competent employee when an employer is making cut-backs due to economic necessity is insufficient to establish a *prima facie* case of age discrimination. . . . The plaintiff in such reorganization cases must come forward with additional direct, circumstantial, or statistical evidence that age was a factor in his termination in order to establish a *prima facie* case.

Id. at 1090-91 (citations omitted; emphasis added).

Similarly, in *Holley v. Sanyo Manufacturing, Inc.*, 771 F.2d 1161, 1165-66 (8th Cir. 1985), the Eighth

Circuit also held that in an employment discrimination case arising out of a reduction in force or reorganization, the plaintiff must come forward with additional evidence that age was a factor in order to establish a *prima facie* case. In *Holley*, the Eighth Circuit reversed a jury verdict in favor of plaintiff because he did not present this additional evidence showing that age was a factor in his termination. The court rejected statistical evidence relied upon by plaintiff as well as evidence that his personnel file contained derogatory statements about his heart disease. *Id.* at 1166-67. The Sixth Circuit also rejected plaintiff's claim that one could infer that age was a determining factor in his selection for layoff simply because his duties were assumed by a younger person. *Id.* at 1167-68.

Other Courts of Appeals also have developed for the reduction-in-force situation more rigorous standards for establishing a *prima facie* case. *See Matthews v. Allis-Chalmers*, 769 F.2d 1215, 1217 (7th Cir. 1985) (a plaintiff must show: (1) he/she was within the protected age group; (2) he/she was adversely affected through discharge or demotion; (3) he/she was qualified to assume another position, as well as (4) produce evidence from which a factfinder might reasonably conclude that the employer intended to discriminate in making the employment decision at issue). *See also Williams v. General Motors Corp.*, 656 F.2d 120, 129 (5th Cir.), *cert. denied*, 455 U.S. 943 (1982); *Allison v. Western Union Telegraph Co.*, 680 F.2d 1318, 1321 (11th Cir. 1982).

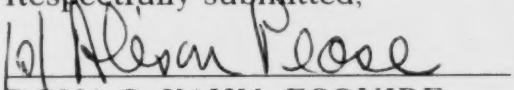
The Third Circuit, which permits a more lax standard for establishing a *prima facie* case in the reduction-in-force context, is clearly out of step with the majority of the federal courts of appeals. Moreover, the majority view is the better-reasoned one. The *McDonnell-Douglas* standard is better suited to an analysis of an individual employment decision rather than a large-scale layoff, involving numerous employees. Moreover, in the reduction-in-force case, plaintiffs often cannot point to a

"replacement," therefore omitting an important prong of the *McDonnell-Douglas* standard.

CONCLUSION

For the foregoing reasons, the petition for writ of certiorari should be granted.

Respectfully submitted,



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APPENDIX

OPINION OF COURT OF APPEALS
NOVEMBER 2, 1987

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 87-1026

BHAYA, LAL R. and CARNER, RICHARD and
HAESSLER, WILLIAM J. and PARZICK, HENRY A.
and WILLIAMS, EARLE,
Appellants

vs.

WESTINGHOUSE ELECTRIC CORPORATION

Appeal from the United States District Court
for the Eastern District of Pennsylvania
(D.C. Civil No. 84-5381)

Argued
August 4, 1987
Before: SEITZ, MANSMANN and
GREENBERG, *Circuit Judges*.

(Filed November 2, 1987)

OPINION OF THE COURT

MANSMANN, *Circuit Judge*.

This is an appeal from the district court's entry of judgment for the defendant employer under Fed. R. Civ. P. 50(b) notwithstanding the jury verdict for the plaintiffs in this action under the Age Discrimination in Employment Act, 29 U.S.C. § 621 *et seq*. We have jurisdiction under 28 U.S.C. § 1291 to review the final order of the district court. When deciding a motion for judgment notwithstanding the verdict, the trial judge must determine whether the evidence and justifiable inferences most favorable to the prevailing party afford any rational basis for the verdict. *Berndt v. Kaiser Aluminum & Chemical Sales, Inc.*, 789 F.2d 253 (3d Cir. 1986). Our review of the application of this standard is plenary. *Id*. We find that the district court erred in failing to afford the plaintiffs the benefit of all reasonable inferences to be drawn from the evidence. Consequently we will vacate the order of the district court and remand for reinstatement of the jury verdict in favor of the plaintiffs.

I.

The plaintiffs are five engineers who were laid off or retired on December 17, 1982 when the defendant Westinghouse Corporation eliminated the job progression of Negotiation Engineer. The plaintiffs were the only employees in that job progression and, at the time of their terminations, they ranged in age from 54 to 62 and had between 16 and 39 years of service with Westinghouse.[1] The parties agree that economic conditions necessitated a reduction in force. They also

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1. Plaintiff Lal R. Bhaya was 58 years of age and had 16 years of service; Richard Carner was 54 and had 31 years of service; William J. Haessler was 55 and had 35 years of service; Henry A. Parzick was 62 and had 39 years of service, and Earle Williams was 59 with 33 years of service.

agree that, under the collective bargaining agreement which governs their relationship, the plaintiffs were not eligible to "bump" employees in other job progressions.

The plaintiffs filed this action claiming that, in effectuating the necessary force reduction, the defendants discriminated against the plaintiffs because of their age. The district court had subject matter jurisdiction under the Age Discrimination in Employment Act, 29 U.S.C. § 621 *et. seq.*, ("ADEA").

The plaintiffs claimed that the defendants eliminated the plaintiffs' job progression beeause the engineers in that category were older than engineers in two other salaried job progressions -- namely "Availability Assurance Engineer" and "Applications Engineer" -- which were not eliminated. The plaintiffs claimed that their duties were assumed by Availability Assurance Engineers and Applications Engineers, and that they are qualified to do the work performed by Availability Assurance Engineers and Applications Engineers. The plaintiffs asserted that the defendants could have maintained an adequate workforce by laying off engineers in all three progressions according to their seniority and transferring the duties of the other classifications to the older and more senior Negotiations Engineers. The plaintiffs' theory of recovery was that the jury could logically infer, from the defendant's failure to pursue this course of action, that age was a factor in the defendant's decision to eliminate the plaintiffs' job progression.

At the close of the evidence, the defendants moved for a directed verdict. The motion was denied. The jury was instructed that it might find for the plaintiffs under the ADEA only if age was a determining factor in Westinghouse's selection of the job classification of negotiations engineer for elimination. When the jury returned a verdict for the plaintiffs, the defendants moved for a judgment n.o.v., because of the asserted insufficiency of the evidence or, in the alternative, for a

new trial because of asserted trial errors.[2] Judgment n.o.v. was granted by the district court. Consequently, no action was taken on the Motion for a New Trial.

II.

A plaintiff may recover under the ADEA only if he proves by a preponderance of the evidence that age was a determining factor in the employer's decision. *Smithers v. Bailar*, 629 F.2d 892 (3d Cir. 1980). He may meet this burden with direct evidence, or when no direct evidence of intent is available, the employee plaintiff may have the benefit of a presumption of the employer's discriminatory intent by first establishing a prima facie case by circumstantial evidence. "This prima facie case is easily made out: a plaintiff alleging a discriminatory layoff need show only that he was laid off from a job for which he was qualified while others not in the protected class were treated more favorably." *Massarsky v. General Motors Corp.*, 706 F.2d 111 (3d Cir.), *cert. denied* 464 U.S. 937 (1983).

As in any lawsuit, if the plaintiff fails to establish his prima facie case, the defendant may persuade the district court to dismiss the action. *U.S. Postal Service Board of Governors v. Aikens*, 460 U.S. 711, 714 (1983) ("*Aikens*"). If the plaintiff successfully proves its prima facie case, the defendant has the "burden of proof at this stage to meet [plaintiff's] prima facie case of discrimination." *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 803 (1973) ("*McDonnell Douglas*"). To withstand a directed verdict, the defendant must "articulate some legitimate, nondiscriminatory reason" for its action, *id.* at 802, and must introduce evidence to prove that it acted for this reason. *Furnco Construction Corp. v. Waters*, 438

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2. In addition to its claims regarding the sufficiency of the evidence, the defendant based its new trial motion on asserted errors involving, *e.g.*, admission and/or exclusion of certain evidence, jury instruction, and prejudicial comments in the presence of the jury.

U.S. 567, 577 (1978). The burden of production then shifts back to the plaintiff, because the ultimate burden to prove discriminatory animus remains with the plaintiff. *See e.g. Duffy v. Wheeling Pittsburgh Steel Corp.*, 738 F.2d 1393, 1395 (3d Cir.) *cert. denied*, 469 U.S. 1087 (1984); *Texas Department of Community Affairs v. Burdine*, 450 U.S. 248, 256 (1981) ("Burdine"). The plaintiff may meet this burden either through evidence presented in his case in chief or by way of rebuttal evidence.

The defendant in this case made no attempt to persuade the district court to dismiss the action for lack of a prima facie case. Instead, the defendant has done everything that would be required of him if the plaintiff had properly made out a prima facie case. Therefore, whether the plaintiff actually did so is no longer relevant. *Aikens*, 460 U.S.at 715.

When the defendant responds to the plaintiff's proof by offering evidence of the reason for its treatment of the plaintiff, the factfinder is then in a position to decide the ultimate factual issue in the case. *Id.* The question facing the trier of fact at the close of the evidence in an employment discrimination case is "whether the defendant intentionally discriminated against the plaintiff." *Id.* "In short, the [factfinder] must decide which party's explanation of the employer's motivation it believes." *Id.* at 716.

In this case, the plaintiffs assert that their job classification was selected for elimination by the defendant because of the age of the engineers remaining in that job classification. The defendant denies discrimination based on age, asserting that a reduction in force was necessitated by economic conditions and its elimination of the job category was based on a lack of need for the services being performed by negotiation engineers. Thus the issue at trial was framed by those opposing factual contentions. *See McDonnell*, 411 U.S. at 801.

The issue on this appeal is straightforward. The jury has told us which explanation it believes, and we

are bound by that finding if there is evidence of record to support it. Our only inquiry is whether, taking the record as a whole and resolving all factual disputes in favor of the plaintiffs, the evidence and justifiable inferences therefrom reasonably support the plaintiffs' explanation. We turn now to consider whether a reasonable juror could have concluded that the defendant intentionally discriminated against the plaintiffs because of their age.

III.

Each plaintiff testified that when he was laid off or retired his remaining work was transferred to a younger engineer in another job progression, and that younger engineers were retained to perform work which the plaintiffs were qualified to perform. The plaintiffs also presented expert testimony of Richard Andrulis, Ph.D., who opined that the plaintiffs were qualified to perform the remaining tasks in other job progressions and that the tasks could have been transferred without a change in plaintiffs' job description. Andrulis testified that statistical analysis had led him to the conclusion that there was "no question that age was a determining factor" in the decision to eliminate the plaintiffs' job progression.

The plaintiffs' expert testified that layoffs by seniority within each job family would have provided the defendants with a workforce capable of carrying out all tasks that were being performed at the time of the plaintiffs' termination. He testified that there was substantial financial benefit to Westinghouse in discharging older workers instead of younger ones. His statistical analysis showed that the class of engineers most dramatically affected by the layoffs in general were the Negotiation Engineers, who were substantially older as a group than the other engineering job families. Negotiation engineers, average age 48.9 years, were laid off at a 93.3% rate; Availability Assurance Engineers, average age 35.8 years, were laid off at a 29.4% rate.

The district court, in considering the defendant's motion for judgment n.o.v., stated that it would decline to consider whether the defendant's evidence controverted the plaintiffs' evidence inasmuch as, for purposes of a motion for judgment n.o.v., all disputed questions of fact must be resolved in the plaintiffs' favor. The district court found that the plaintiffs' evidence showed that the Negotiation Engineers were on average older than Availability Assurance and general engineers and were treated less favorably. Inexplicably, however, the district court then immediately proceeded to credit the defendant's evidence of a nondiscriminatory reason for its decision to eliminate the plaintiffs' job progression.

The employer's proffered reason for preferring one group of employees over another was that Westinghouse management determined that the functions performed by the Negotiations Engineers were expendable without causing too much disruption of the normal operation of the business. Negotiations Engineers performed services for both the Marketing Department and the Availability Assurance Department,[3] and heads of both departments agreed that they could function without the services of the Negotiations Engineers who coordinated information which was available from other departments.

The defendant's evidence consisted exclusively of oral testimony regarding its reason for elimination of the job.[4] The reason was principally explained by James Borden, Manager of the Availability Assurance Department with responsibility for both Availability Engineers and Negotiation Engineers at the time the

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3. Plaintiff Bhaya was a Negotiations Engineer with the Marketing Department, while the other plaintiffs were Negotiations Engineers with the Availability Assurance Department.

4. The defendants apparently maintained no contemporaneous "paper trail" to evidence the course of business planning and decision-making leading to the effectuation of the reduction in force.

plaintiffs were terminated. Evidence regarding the collective bargaining agreement was provided by the oral testimony of witnesses Borden and Chester A. Turnbull, Manager of Salary Labor Relations and of Wage and Salary Administration at Westinghouse.

The defendant's witnesses testified that the job tasks could not have been transferred without engaging in collective bargaining unless assumption of those tasks would have required no revision of the plaintiffs' job description. The witnesses asserted that such a redescription would have been necessitated so that interchangeability was precluded except through collective bargaining.

In crediting the defendant's explanation, the district court effectively reversed the requirement that in reviewing a jury verdict we are to draw all inferences in favor of the prevailing party. The proof of this type of case is no different than any other, and there is no reason in an age discrimination case why testimony evidencing a reason *must* be credited by the factfinder.

We are reviewing a general verdict. It is impossible to tell whether the plaintiffs' evidence persuaded the jury that the employer considered age in addition to the relative expendability of the particular services being performed by the plaintiffs or whether the jury simply disbelieved the defendant's explanation for its action. If there is evidence to support either of these possible reasons for the verdict, the district court erred in granting judgment notwithstanding the verdict. Viewing the evidence in the light most favorable to the plaintiffs and drawing competing inferences in their favor, we find that the record contains indirect evidence which, if credited, raises an inference of discrimination.

The district court erroneously determined that the indirect evidence supporting the plaintiffs' prima facie case "cannot, without more, give rise to an inference of age discrimination in light of defendant's articulation of a legitimate, nondiscriminatory reason for its decision to eliminate the negotiation engineer job

progression." The district court apparently thought that the defendant dispelled any inference of discrimination merely by introducing testimony of a legitimate reason for its actions.

Evaluation of witness credibility is the exclusive function of the jury, and where the only evidence of intent is oral testimony, a jury could always choose to discredit it. *Carter v. Duncan-Huggins, Ltd.*, 727 F.2d 1225, 1234 (D.C. Cir. 1984). *See also Dreyer v. Arco Chemical Div. of Atl. Richfield*, 801 F.2d 651, 655-56 (3d Cir. 1986), *cert. denied*, 107 S. Ct. 1348 (1987).

The plaintiffs introduced evidence that (1) they belong to a protected class; (2) they were qualified for their positions; (3) they were dismissed despite being qualified; and (4) they ultimately were replaced by persons sufficiently younger to permit and inference of age discrimination. *See Chipollini v. Spencer Gifts*, 814 F.2d 893 (3d Cir.), *cert. dismissed*, 56 U.S.L.W. 3183 (U.S. Sept. 8, 1987) (No. 86-2007); *Maxfield v. Sinclair International*, 766 F.2d 788, 793 (3d Cir. 1985), *cert. denied*, 474 U.S. 1057 (1986). From this the jury can infer, if such actions remain unexplained, that it is more likely than not that such actions were based on an illegal discriminatory criterion such as age. *Id.*

The district court also relied erroneously upon an asserted absence of evidence "directly impugning the nondiscriminatory reason articulated by defendant for its decision to eliminate the negotiation engineer position." The testimony of the plaintiffs' expert during their case in chief specifically takes issue with the defendant's assertions that the plaintiffs were not qualified to perform work still existing at Westinghouse. The expert also challenged the defendant's assertion that such work could not have been transferred to the plaintiffs as readily as the plaintiffs' work was transferred to engineers in other progressions.

The plaintiffs' evidence was adequate to support an inference, initially a presumption, of

discrimination. When the defendant produced evidence of a nondiscriminatory reason, the *presumption* dropped from the case. A permissible *inference* remained, however, to create an issue of fact. In addition, the testimony of the plaintiffs' expert raised issues of fact with respect to the defendant's asserted reason.

Because we must resolve all factual issues in favor of the plaintiffs, we must assume that the factfinder did not believe the defendant. "When all legitimate reasons for rejecting an applicant have been eliminated as possible reasons for an employer's actions, it is more likely than not the employer, who we generally assume acts only with *some* reason, based his decision on an impermissible consideration such as (age)." *Furnco Construction Corp. v. Waters*, 438 U.S. at 577 (emphasis in original). Therefore, the inferences from the plaintiffs' prima facie case, together with the testimony provided by the plaintiffs' expert which rebuts the proffered explanation by the defendant, may support a verdict in their behalf.

IV.

We find that, in considering the defendant's motion for judgment notwithstanding the verdict, the district court failed to give the plaintiffs the benefit of all reasonable inferences to be drawn from the evidence. Therefore we will vacate the order of the district court and remand for reinstatment of the jury verdict in favor of the plaintiffs. On remand the district court may consider the contentions of the defendant contained in the Motion for a New Trial.

ORDER OF COURT OF APPEALS DENYING DEFENDANT'S PETITION FOR REHEARING
November 30, 1987

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 87-1026

Bhaya

vs.

Westinghouse Electric Corp.

SUR PETITION FOR REHEARING

Present: GIBBONS, *Chief Judge*, SEITZ, HIGGINBOTHAM, BECKER, STAPLETON, MANNSMANN, GREENBERG, HUTCHINSON, SCIRICA, and COWEN, *Circuit Judges*.

The petition for rehearing filed by appellee in the above entitled case having been submitted to the judges who participated in the decision of this court and to all other available circuit judges of the circuit in regular active service, and no judge who concurred in the decision having asked for rehearing, and a majority of the circuit judges of the circuit in regular active service not having voted for rehearing by the court in banc, the petition for rehearing is denied.

BY THE COURT,

Circuit Judge

OPINION OF THE DISTRICT COURT
DECEMBER 30, 1986

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

LAL R. BHAYA,	:	CIVIL ACTION
RICHARD CARNER,	:	
WILLIAM J. HAESSLER,	:	
HENRY A. PARZICK, and	:	
EARLE WILLIAMS	:	
	:	
	:	
-v-	:	
	:	
WESTINGHOUSE ELECTRIC	:	
CORPORATION	:	NO. 84-5381

OPINION

Lord, S.J. December 30, 1986

Defendant in this age discrimination case moves for judgment notwithstanding the verdict or, in the alternative, for a new trial. It contends that there was insufficient evidence to support a jury verdict finding it liable to plaintiffs under the Age Discrimination in Employment Act ("ADEA"), 29 U.S.C. §§ 621-634, and finding plaintiffs entitled to back pay, front pay and liquidated damages. Defendant also contends that it should be given a new trial because of trial error. For the reasons that follow, I will grant defendant's motion for judgment notwithstanding the verdict as to liability, and therefore do not reach the other issues that defendant raises.

Before their layoff, plaintiffs Lal Bhaya, Henry Parzick, William Haessler, Earle Williams and Richard Carner were employed as negotiation engineers in the Combustion Turbine Systems Division at defendant's facility in Concordville, Pennsylvania. The business of

that division, insofar as it is relevant, was selling new gas turbines and repairing old ones, as well as selling upgrades, maintenance programs and replacement parts for them. In November, 1982, as part of a reduction in force necessitated by poor economic conditions in the turbine generator industry, defendant eliminated the negotiation engineer position. Under the collective bargaining agreement then in effect, plaintiffs did not have the right to bump employees from other job progressions. Consequently, they were laid off on December 17, 1982. At that time, plaintiffs' ages ranged from fifty-four to sixty-two, and their tenure at Westinghouse ranged from sixteen to thirty-nine years.

Plaintiffs do not dispute that, once their position was eliminated, the collective bargaining agreement controlled whether they could bump other employees, and thus they do not contend that their inability to do so was impermissibly related to their ages. Nor do plaintiffs dispute that economic conditions necessitated a reduction in force at defendant's Concordville facility. Their claim is that age was a determining factor in defendant's decision to implement the reduction in force by, *inter alia*, eliminating the position of negotiation engineer.

II.

In 1982, negotiation engineer was one of nine job progressions of salaried employees covered by the collective bargaining agreement at the Concordville facility. Plaintiffs tried their case on the theory that, because of their age, they were treated less favorably than the engineers in two other job progressions: in Bhaya's case, applications engineer,[1] and in the case of the other four

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1. Nothing in the record shows that applications engineer was a job progression at defendant's Concordville facility. As best as I can tell, applications engineer is a designation given by Bhaya and plaintiffs' counsel to certain engineers within the general engineer job progression. However, it is virtually impossible to ascertain from

plaintiffs, availability assurance engineer. Although defendant laid off less senior engineers in those two job progressions, it did not entirely eliminate either one, and, as of the date plaintiffs were laid off, the more senior engineers in those job progressions remained employed at Westinghouse.

Plaintiffs adduced the following evidence in support of their claim. Parzick, Haessler, Williams and Carner testified that they were older[2] and had more seniority than the availability assurance engineers. Each testified that, after the availability assurance engineer job progression was created in 1977 or 1978, availability assurance engineers took over some of his work.[3] Each also testified that, at the time of his layoff in 1982, he had the ability to do the work then being done by the availability assurance engineers.

Bhaya testified that he was older than all of the applications engineers[4] and more senior than some. He also testified that, at the time of his layoff in 1982, he was capable of doing the work then being done by applications engineers.

NOTES *(Continued)*

Bhaya's testimony what he deems the distinguishing characteristics of that group.

2. According to calculations made by plaintiffs' attorney, which he said were based on plaintiffs' Exhibit No. 8, the average age of negotiation engineers employed at Westinghouse in mid-1982 was 48.9, while the average age of availability assurance engineers was 35.8.

3. Plaintiffs claim age discrimination only as to their layoff, not as to the creation of the availability assurance engineer job progression in 1977 or 1978. As I understand it, plaintiffs offered this evidence to prove that because they had at one time, *i.e.*, before the creation of the availability assurance engineer job progression and transfer to those engineers of some of the negotiation engineers' duties, done the availability assurance engineers' work, they were capable of doing that work in 1982.

4. According to calculations made by plaintiffs' attorney, *see supra*, note 2, the average age in mid-1982 of the general engineers, *see supra*, note 1, was 41.8.

Each plaintiff testified as to his job duties as a negotiation engineer. Parzick testified that he dealt with customers and the Westinghouse sales office regarding the sale of renewal and replacement parts, as well as modifications, for customer-owned Westinghouse turbines. Haessler testified that his responsibility was to sell parts and repair service for gas turbines and to negotiate settlements as to who would pay for what. Williams testified that he prepared proposals on gas turbine components, stocking programs, product modifications and upgrades. Bhaya testified that he prepared proposals for the marketing department. Finally, Carner testified that, until 1980, he created parts catalogs, and that, thereafter, he worked on developing a training program to teach foreign students how to operate the gas turbines in their native countries.

Plaintiffs also compared the negotiation engineer position to that of the availability assurance or applications engineer. However, the evidence presented by plaintiffs on this point was fraught with contradictions. Williams testified that, in 1982, his job was essentially the same as that of the availability assurance engineers. He also testified, however, that there was a distinction, the nature of which he did not identify, between the two jobs. Carner testified that there was no difference, in 1982, between his job duties and the job duties of availability assurance engineers. On cross-examination, however, he testified that he supposed that there was a significant difference between his job duties and the job that the availability assurance engineers were doing. Bhaya testified that he did not know what the duties of the applications engineers were, but that at times, the frequency of which he did not identify, he did the exact same thing as the applications engineers. Parzick testified that, in 1982, he was doing basically the same job as the availability assurance engineers, but also testified that it was the availability assurance engineers' job to be the technical liaison between the negotiation and the

other engineers. Haessler testified that, in 1982, there was a difference, although not a significant one, between his job and the job of availability assurance engineer. He testified that his job involved developing costs, selling prices and quotation letters, while the availability assurance engineers did the technical liaison work that he had done before 1978.

Plaintiffs placed into evidence the job descriptions for senior and advanced negotiation engineer and senior and advanced availability assurance engineer. Parzick testified that the availability assurance engineer descriptions accurately represented the duties he had observed those engineers performing from 1978 through 1982. The negotiation engineer descriptions stated that the primary function of that job was to develop proposals for contract negotiations and to follow up on contract awards. The assigned responsibilities focused on developing proposals and sales strategy, and on contract management. The primary function of availability assurance engineers, according to the job descriptions, was to assume responsibility for availability assurance.[5] The assigned responsibilities focused on managing outages on Westinghouse turbines in the field. Plaintiffs did not offer a job description for the applications engineer job.

Plaintiffs' expert testified that he had reviewed the job descriptions for negotiation and availability assurance engineers, and from those descriptions had concluded that the responsibilities and requirements for the two jobs were very similar. However, he did not elaborate as to what specific similarities he found. Moreover, he testified on cross-examination that the job descriptions were not the same and that the jobs required different skills and potentially different training. In addition, plaintiffs' attorney conceded that there was

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5. As explained by one of defendant's witnesses, availability refers to the percentage of time equipment in the field, *i.e.*, equipment being used by customers, is available to operate.

nothing in the senior negotiation engineer job description regarding the management of outages on Westinghouse equipment,[6] which was the predominant responsibility enumerated in the job descriptions for availability assurance engineers.

Each plaintiff also testified as to what happened to his work when he was laid off. Parzick testified that his supervisor told him to turn over his current work to the three availability assurance engineers with whom he worked on international projects. Haessler testified that after he left his work was done by an availability assurance engineer named DiTella, who was five years younger than he, and by one of the sales managers. He testified that he had no idea whether availability assurance engineers other than DiTella did his work after he left. Williams testified that he was told to turn his work over to a sales manager, a marketing employee and an availability assurance engineer. Carner testified that, as far as he knew, two availability assurance engineers took over his job: DiTella, who, according to one of plaintiffs' exhibits, was four years younger than Carner, and Beach, who was seven years Carner's junior. Bhaya testified that he was told that his work was going to be taken over by applications engineers and management, but that he did not actually know who did his work after he left.

Plaintiffs introduced the testimony of an expert in industrial management and statistics. He testified to the following. In the overall reduction in force at defendant's Concordville facility, he concluded that there was "equity on balance" in the numbers of employees[7] over

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6. Likewise, it is apparent that there was nothing in the advanced negotiation engineer job description regarding the management of outages.

7. The employees plaintiffs' expert looked at were salaried employees covered by the collective bargaining agreement.

and under the age of forty who were discharged. However, he found significance in the fact that the percentage of negotiation engineers in the group of employees who were terminated was four times greater than their percentage, before the reduction in force, in the work force as a whole.

This led him to compare negotiation engineer to other job progressions that he characterized as related. He compared the rate at which negotiation engineers over forty were laid off to the rate at which availability assurance engineers over forty were laid off. He found that negotiation engineers over forty were discharged at a higher rate than availability assurance engineers over forty, and found that difference to be statistically significant. From that, he concluded that age was a strong and determining factor in eliminating the negotiation engineers. He also found that negotiation engineers over forty were discharged at a higher rate than general engineers over forty. Again, that led him to conclude that age was a determining factor in the elimination of the negotiation engineer position.[8] However, on cross-examination, he conceded that, in the negotiation, availability assurance and general engineer job progressions, whether considered individually or in total, one's chances of being laid off were greater if one was younger than if one was older.

In addition, plaintiffs' expert opined that, assuming that the job responsibilities of negotiation and availability assurance engineers were in fact similar, the proper method of reducing defendant's work force was by terminating the least senior employees and retaining the more senior ones, regardless of the job progression in which they worked, because this would recognize the

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8. I realize that these comparisons and the conclusions plaintiffs' expert drew from them are so obviously nonsensical that the reader of this opinion may think that I am misstating his testimony. I am not.

fact that the negotiation engineers were qualified to perform the availability assurance engineers' functions. He also testified that, in terms of pensions and other benefits, it was financially beneficial for defendant to discharge older rather than younger employees. However, on cross-examination, he testified that at least some of the premises for this conclusion were speculative.

Finally, Parzick testified as to a conversation he had with Thomas Kinlin, his immediate supervisor, on the day that he was informed that he would be laid off. Parzick testified that Kinlin told him that at an executive meeting at which Kinlin was present, the negotiation engineers' termination was discussed, and "[a] statement was made that maybe we shouldn't be eliminating this group. Maybe we're doing something illegal or against the contract, and Mr. Nick Kulokoski, who was the personnel manager of the division, said, let's give it a try. What do we have to lose?"

III.

In considering defendant's motion for judgment notwithstanding the verdict, I must view the evidence in the light most favorable to plaintiffs. Therefore, I will not review defendant's evidence insofar as it controverted evidence offered by plaintiffs, because for purposes of this motion all disputed questions of fact must be resolved in plaintiffs' favor.

It is essential, however, to consider defendant's evidence insofar as it was offered to meet defendant's burden of articulating a legitimate, nondiscriminatory reason for its decision to eliminate the negotiation engineer job progression. As to this issue, James Borden, who in June, 1982 was acting manager of the availability assurance department, testified to the following.

As of June, 1982, business had declined drastically. There had been no new apparatus orders, and services

sales were well below the forecast level. Management decided that, in order to survive in the shrinking market, it would be necessary to reorganize the business. After a general reduction in force in the summer of 1982, Borden and other managers assessed which job functions could be eliminated with the least deleterious business effect.

Borden and Mr. McIntyre, who managed the marketing department, both determined that one of the job progressions that could be eliminated was negotiation engineer. The reason, according to Borden, was that the negotiation engineers' function was to support the regional sales managers. They did that by gathering information as to pricing, material availability and technical matters from various functional groups, and putting together proposals. Borden felt that, although the sales managers might be inconvenienced, they could continue to get sales without that type of support.

Borden also testified that he did not consider eliminating the availability assurance engineers because of the importance of that function to Westinghouse customers. He testified that, after the availability assurance engineer job progression was created in 1978, availability improved by 20%, and customer satisfaction improved also.

Finally, Borden testified as to how the business functioned after the negotiation engineer job progression was eliminated. He testified that management reinstituted a procedure called a service negotiation estimate, whereby the customer order department would provide routine information on pricing and availability of parts, getting assistance as necessary from the appropriate technical group, such as the availability assurance engineers. He further testified that the sales managers assumed responsibility for all additional information gathering and for preparing proposals and quotations.

In response to plaintiffs' claim that they could have been retained and done the availability assurance engineers' work, defendant introduced the testimony of Chester Turnbull. In 1982, Turnbull was responsible for overseeing compliance with the salaried employees' collective bargaining agreement. Turnbull testified that, under the collective bargaining agreement, duties could be transferred from one job progression to another only if the transfer did not necessitate a revision of the job descriptions. If a revision was required to effect the transfer, the union had to be notified and given an opportunity to bargain with management. If an agreement was not reached, the union could grieve the transfer. Turnbull testified that, in his opinion, the availability assurance engineers' job duties could not have been transferred to the negotiation engineers, because such a transfer would have necessitated revising the job descriptions, something which, if done during a reduction in force, would lead to grievances and subject the union and the company to charges of unfair labor practices.

IV.

The question I must decide is whether, viewing all the evidence in the light most favorable to plaintiffs, they sustained their ultimate burden of showing that age was a determining factor in defendant's elimination of the negotiation engineer position.[9] *See Dreyer v. Arco Chemical Co.*, 801 F.2d 651, 654 (3d Cir. 1986); *Berndt v. Kaiser Aluminum & Chemical Sales, Inc.*, 789 F.2d 253, 257 (3d Cir. 1986). Plaintiffs assert that they met this

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9. This was the question that the jury answered in the affirmative. At the points for charge conference, the parties agreed that this question correctly stated the theory on which plaintiffs tried their case.

burden both with affirmative evidence and by demonstrating the lack of credibility in the reason given by defendant for the elimination of their position.

I find no affirmative evidence which even begins to sustain plaintiffs' burden of proof. Although plaintiffs' evidence shows that the negotiation engineers were, on average, older than the availability assurance and general engineers,[10] and were treated more favorably, this cannot, without more, give rise to an inference of age discrimination in light of defendant's articulation of a legitimate, nondiscriminatory reason for its decision to eliminate the negotiation engineer job progression. The only other affirmative evidence offered by plaintiffs was Parzick's testimony as to his conversation with Kinlin. However, assuming for purposes of this motion that I properly admitted that testimony,[11] I conclude that it simply does not show, directly or by inference, that age was a determining factor in defendant's decision. Plaintiffs adduced no evidence showing that either the unidentified speaker or Kulokoski had anything to do with the decision to eliminate plaintiffs' position. To infer either from the ambiguous statement[12] by the unidenti-

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10. Defendant argues that the availability assurance engineers who plaintiffs Haessler and Carner claimed took over their jobs were only four to seven years younger than those plaintiffs, thereby precluding that age was a determining factor in the elimination of those plaintiffs' positions. Because I conclude that, even assuming that each plaintiff may rely on the fact that, on average, the availability assurance engineers were younger than the negotiation engineers, there was insufficient evidence to support the jury's verdict, I need not address this issue.

11. Defendant argues vigorously that that testimony was not admissible as nonhearsay and that its admission was highly prejudicial. In their brief, plaintiffs argue that Kinlin's and Kulokoski's statements were admissible, but do not address the question of the admissibility of the statement by the unidentified declarant.

12. Defendant argues that this statement clearly refers to whether defendant's actions were permissible under the collective bargaining agreement, while plaintiffs argue that it refers to age discrimination. Both read far more into the statement than logic or

fied speaker or from Kulokoski's response that age was a determining factor in Borden's or McIntyre's decision-making would be impermissibly speculative.

Neither do I find any evidence directly impugning the nondiscriminatory reason articulated by defendant for its decision to eliminate the negotiation engineer position. Plaintiffs presented no evidence refuting the reasons that Borden gave for his determination that the job was one which could be eliminated without serious adverse affect on the business. Plaintiffs' own testimony as to their job duties supports Borden's characterization of their function as supporting sales. Plaintiffs did not argue, let alone submit evidence to show, that the function of coordinating information could not be taken over by the regional sales managers. Nor did plaintiffs refute Borden's testimony as to what actually occurred to their function once the job progression was eliminated. Although plaintiffs identified the individuals to whom they turned over their current work when they left, none testified as to whether or not the responsibility for their job function was actually assumed by the sales managers. Finally, plaintiffs presented no evidence contradicting Borden's testimony as to the importance of retaining the availability assurance engineers' functions.

In the absence of affirmative evidence of discrimination or direct evidence impugning defendant's position, plaintiffs' case rests upon their argument that defendant's reason for eliminating their job progression was pretextual because plaintiffs were qualified to stay at Westinghouse and accept job tasks from younger and less senior employees.[13] This argument fails for two reasons.

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the evidence allows.

13. Plaintiffs concede that they could not, under the collective bargaining agreement, have been given the position of availability assurance or applications engineer. Their argument is that they should have been kept in the negotiation engineer position and given the duties of employees in other job progressions.

First, as a logical matter, that plaintiffs were qualified to do jobs other than the one they held does not show that defendant's reason for eliminating the negotiation engineer position was pretextual. Plaintiffs cite no cases, and I am aware of none, holding that a defendant's failure to devise a way to retain older employees and lay off younger ones during a reduction in force is a violation of ADEA. *See Loeb v. Textron, Inc.*, 600 F.2d 1003, 1012 n.6 (1st Cir. 1979) (an employer is not required to adopt the policy that will maximize the number of older persons in its work force).

Second, plaintiffs' evidence, no matter how liberally construed, does not support plaintiffs' contention that all or even most of the job duties of the availability assurance and applications engineers could have been transferred to the negotiation engineers. Plaintiffs argue that their evidence established that the job duties of the negotiation, availability assurance and applications engineers were similar, and therefore that the job duties could have been interchanged without union bargaining. However, plaintiffs' evidence as to the similarity of job functions was hopelessly vague and contradictory. *See supra* pp. 5-7. The only conclusion that can reasonably be drawn from plaintiffs' evidence is that there was some degree of similarity, and perhaps some overlap, in job duties. It is impossible, though, to draw any conclusion as to specific areas of similarity or overlap. To infer from plaintiffs' evidence that they could have been given duties such as managing outages on Westinghouse equipment in the field, without necessitating a change in their job descriptions, would be pure speculation. Moreover, no such inference can be drawn from the testimony as to the distribution of the negotiation engineer job duties to other engineers when plaintiffs were laid off, because plaintiffs did not introduce a shred of evidence as to whether other engineers were given

duties that would have necessitated a change in their job descriptions.[14]

Plaintiffs' remaining arguments are specious. They argue that Borden's testimony was not credible because he produced no documentary evidence supporting his determination that the negotiation engineer position could be eliminated without serious adverse effect on the business. However, plaintiffs submitted no evidence as to whether records were regularly kept by defendant regarding this type of decision. Moreover, plaintiffs adduced no evidence showing that a study was necessary or would even have been helpful in determining which job functions could be eliminated to effect the reduction in force.

Further, any reliance by plaintiffs on the testimony of their expert as evidence upon which the jury could reasonably have based its verdict is misplaced. It is utterly ridiculous to draw a conclusion about age discrimination by comparing the rates of termination of three groups of employees over forty. It is elementary that to be able to draw any conclusion as to whether age correlates with rates of termination, one must compare groups of older and younger employees. The expert's testimony that it was financially beneficial for defendant to lay off older workers cannot be given any weight, as he admitted that at least some of the premises underlying his conclusion were speculative.

Finally, at oral argument on defendant's motion and in his closing speech to the jury, plaintiffs' attorney seized upon a statement made by Borden that "there is some opinion by industry experts that the turbine generator business might come back in this century." The attorney argued that, from this statement, one could

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14. For example, there is no evidence in the record that availability assurance or applications engineers, rather than sales managers, assumed the responsibility for developing sales proposals or following up on contract awards.

resonably infer that Borden, when planning how to reduce defenant's work force, decided to lay off plaintiffs because, being older, they would not be working when the business turned around in the year 2000. This type of rank speculation is obviously impermissible, and certainly cannot support the jury's verdict.

Having reviewed all the testimony and exhibits and having considered all of plaintiffs' arguments to the contrary, I conclude that plaintiffs did not submit the minimum quantum of evidence from which the jury reasonably could have found that plaintiffs sustained their burden of proving intentional age discrimination. Accordingly, I will grant defendant's motion for judgment notwithstanding the verdict.

An appropriate order will be entered.

_____

Joseph S. Lord, III S.J.

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

LAL R. BHAYA	:	CIVIL ACTION
RICHARD CARNER,	:	
WILLIAM J. HAESSLER,	:	
HENRY A. PARZICK, and	:	
EARLE WILLIAMS	:	
	:	
v.	:	
	:	
WESTINGHOUSE ELECTRIC	:	
CORPORATION	:	NO. 84-5381

ORDER

AND NOW, this 30th day of December, 1986, it is ORDERED that defendant's motion for judgment notwithstanding the verdict is GRANTED. The judgment dated December 20, 1985 and entered December 23, 1985 is VACATED, and judgment is ENTERED IN FAVOR OF DEFENDANT and AGAINST PLAINTIFFS.

BY THE COURT:

_____

Joseph S. Lord, III S.J.

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

LAL R. BHAYA	:	CIVIL ACTION
RICHARD CARNER,	:	
WILLIAM J. HAESSLER,	:	
HENRY A. PARZICK, and	:	
EARLE WILLIAMS	:	
	:	
v.	:	
	:	
WESTINGHOUSE ELECTRIC	:	
CORPORATION	:	NO. 84-5381

ORDER

AND NOW, this 30th day of December, 1986, it is ORDERED that defendant's motion for judgment, plaintiffs' motion to strike defendant's motion to amend the judgment, and defendant's motion to vacate the judgment are DENIED AS MOOT.

BY THE COURT:

_____

Joseph S. Lord, III S.J.

Supreme Court, U.S.
FILED
MAY 19 1988
JOSEPH F. SPANIOL, JR.
CLERK

No. 87-1448

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1987

WESTINGHOUSE ELECTRIC CORPORATION,
Petitioner

v.

LAL R. BHAYA,
RICHARD CARNER,
WILLIAM J. HAESSLER,
HENRY A. PARZICK, and
EARLE WILLIAMS,
Respondents

RESPONSE TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

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COUNTER STATEMENT OF QUESTION PRESENTED

Did the Third Circuit Court of Appeals properly apply standards controlling the grant of judgment notwithstanding the verdict and properly hold, in reversing the decision of the United States District Court for the Eastern District of Pennsylvania, that the jury had sufficient evidence before it to properly find that age was a determining factor in the discharge of the plaintiff-respondents?

TABLE OF CONTENTS

	Page
COUNTER STATEMENT OF QUESTION PRESENTED	i
TABLE OF AUTHORITIES	iii
STATEMENT OF THE CASE	1
PROCEDURAL HISTORY	1
STATEMENT OF FACTS	2
ARGUMENT	8
I. THE COURT OF APPEALS APPLIED UNIVERSALLY ACCEPTED PRINCIPLES OF LAW GOVERNING ACTIONS UNDER THE AGE DISCRIMINATION IN EMPLOYMENT ACT	8
II. THE COURT OF APPEALS PROPERLY HELD THAT THE TRIAL COURT ERRED IN USURPING THE FUNCTION OF THE JURY	14
A. It Was Reasonable for the Jury to Infer That Plaintiffs Could Have Assumed Transfer of Job Duties	16
B. The District Court Impermissibly Determined That Plaintiffs Had Not Sufficiently Demonstrated Pretext	18
C. The District Court Impermissibly Weighed the Credibility of Plaintiffs' Expert Witness	20
CONCLUSION	23

TABLE OF AUTHORITIES

Cases: Page

Anderson v. Liberty Lobby, Inc., ____ U.S. ____, 106 S. Ct. 2505 (1986) 15

Berndt v. Kaiser Aluminum & Chemical Sales, Inc., 789 F.2d 253 (3d Cir. 1986) . 9, 10, 13, 14, 15, 17

Blair v. Manhattan Life Ins. Co., 692 F.2d 296, 300 (3d Cir. 1983)..... 18, 21

Borras v. Sea-land Service, Inc., 586 F.2d 881, 884 (1st Cir. 1978)..... 21

Boutros v. Riggs Nat'l. Bank, D.C., 655 F.2d 1257 (D.C. Cir. 1981)..... 15

Carter v. Duncan-Higgins, Ltd., 727 F.2d 1225 (D.C. Cir. 1984)..... 19, 20

Danny Kresky Enterprises Corp. v. Magid, 716 F.2d 215 (3d Cir. 1983)..... 13, 14, 15, 17

Dudley v. South Jersey Metal, Inc., 555 F.2d 96, 101 (3d Cir. 1977) 14

Duffy v. Wheeling Pittsburgh Steel Corp., 738 F.2d 1393 (3d Cir.), cert. denied 469 U.S. 1087 (1984)..... 10, 13

Fireman's Fund Insurance Co. v. Vidafreeze Corp., 540 F.2d 1171 (3d Cir.), cert. den. 429 U.S. 1053 (1977)..... 14, 15, 16-17, 19, 21, 22

Freeman v. Franzen, 695 F.2d 485, 489 (7th Cir. 1982) 18, 21

Furnco Construction Corp. v. Waters, 438 U.S. 567, 577 (1978)..... 12

Grenada Steel Industries, Inc. v. Alabama Oxygen Co., Inc., 695 F.2d 883 (5th Cir. 1983)..... 21

H. C. Blackwell Co., Inc. v. Kenworth Truck Co. 620 F.2d 104 (5th Cir. 1980)..... 15

TABLE OF AUTHORITIES—*(Continued)*

Cases:	Page
Hanslovan v. Pennsylvania Mines Corp., 603 F. Supp. 464 (W.D. Pa. 1985), aff'd. 791 F.2d 917, 791 F.2d 918 (3rd Cir. 1986)	13
Inventive Music, Ltd. v. Cohen, 617 F.2d 29 (3d Cir. 1980)	14
Jayasinghe v. Bethlehem Steel Corp., 760 F.2d 132 (7th Cir. 1985)	13
Lewis v. University of Pittsburgh, 725 F.2d 910 (3d Cir. 1983)	9
Lindsey v. American Cast Iron Pipe Company, 772 F.2d 799 (11th Cir. 1985)	20
Lust v. Clark Equipment Co., Inc. 792 F.2d 436 (4th Cir. 1986)	21
Massarsky v. General Motors Corp., 706 F.2d 111 (3d Cir.), cert. denied, 464 U.S. 937 (1983)	9, 14
McDonnell Douglas Corp. v. Green, 411 U.S. 792 (1973)	9, 12
Metrocare v. Washington Metropolitan Area Transit Authority, 679 F.2d 922, 928 (D.C. Cir. 1982)	17, 18, 21
Rippee v. Grand Valley Mfg. Co., 762 F.2d 25 (3d Cir. 1985)	14
Schulz v. Pennsylvania R.R. Co., 350 U.S. 523 (1956) at 526	15
Smithers v. Bailar, 620 F.2d 892 (3d Cir. 1980)	9
Teamsters v. United States, 431 U.S. 324, 335, n. 15 (1977)	12

TABLE OF AUTHORITIES—*(Continued)*

Cases: Page

Texas Department of Community Affairs v. Burdine, 450 U.S. 248 (1981) 9-10, 12

United States Postal Service Board of Governors v. Aikens, 460 U.S. 711 (1983) 9, 12-13

Zegan v. Central R.R. Co. of NJ, 266 F.2d 101 (3d Cir. 1959) 14

Statutes:

29 U.S.C. §621 et seq. 1

Rules:

28 U.S.C. Fed. R. Civ. P. 50(b) 2

28 U.S.C. Fed. R. Civ. P. 59 2

No. 87-1448

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1987

WESTINGHOUSE ELECTRIC CORPORATION,
Petitioner

v.

LAL R. BHAYA,
RICHARD CARNER,
WILLIAM J. HAESSLER,
HENRY A. PARZICK, and
EARLE WILLIAMS,
Respondents

RESPONSE TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

STATEMENT OF THE CASE

Procedural History

Plaintiffs brought the present action against defendant, Westinghouse Electric Corporation ["Westinghouse"], alleging that Westinghouse terminated their employment on or about December 17, 1982 in violation of the Age Discrimination in Employment Act [ADEA], 29 U.S.C. §621 *et seq.*

The matter proceeded to a bifurcated trial before a jury which first found in favor of all plaintiffs on the issue of liability, and then in the damage phase, awarded to plaintiffs damages for past and future loss of wages. The jury also found that the violation by Westinghouse was wilful. The district court entered judgment and defendant filed timely post-trial motions requesting judgment notwithstanding the verdict or, in the alternative, a new trial, pursuant to Rules 50(b) and 59 of the Federal Rules of Civil Procedure. Defendant also filed a Motion to Amend the Judgment.

On December 31, 1986, the court below, disregarding the verdict of the jury, entered judgment for the defendant, Westinghouse, and against all plaintiffs (A-12 through A-27). The trial court also dismissed as moot all other motions (A-28).

A timely appeal was taken by plaintiffs to the Third Circuit Court of Appeals which, on November 2, 1987, reversed the decision of the trial court and remanded plaintiff's action for consideration of motions for a new trial and to amend the judgment. The matter is now before this Court upon petition of Westinghouse Electric Corporation for the issuance of a writ of certiorari to permit review of the judgment of the United States Court of Appeals for the Third Circuit.

Statement of Facts

In summary, the five plaintiffs herein were engineers who were terminated after long service to their employer, defendant, Westinghouse, and thereafter brought the present action alleging that age was a determining factor in the defendant's action. The gravamen of their complaint was that they each were well over the age of 40 years (57 through 65); were well-experienced engineers with long service to Westinghouse (16 through 34 years); were terminated December 17, 1982 when the position of Negotiation Engineer

was eliminated during a lay-off of personnel from defendant's Concordville facility; that younger engineers were retained for performing tasks that plaintiffs had performed (and were well-qualified to perform) prior to their termination.

Each plaintiff presented independent testimony in support of his claim. Plaintiffs' theories of recovery were further supported by the statistical labor-force expert testimony of Richard Andrulis, Ph.D. who concluded that age was a determining factor in the defendant's action and that if plaintiffs had not been improperly terminated, they could have assumed job tasks of other less senior engineers.

Plaintiff, Henry Parzick, testified that he was born on September 23, 1920 and was 65 at the time of trial. Mr. Parzick stated that he was a graduate of the Worcester Polytechnic Institute and had graduated with a B.S. in Mechanical Engineering. He stated he also took graduate courses in engineering and related management subjects at UCLA. Mr. Parzick joined Westinghouse Electric Corporation on February 23, 1943 and had extensive experience in all phases of engineering including sales and technical management.

After stating his extensive background with Westinghouse Electric Corporation, Mr. Parzick proffered that he could perform and actually did perform other jobs within the general sales engineering area including those tasks specifically performed by Availability Assurance Engineers as contained in job descriptions presented by the plaintiffs. With the aid of Exhibit P-8 (a composite lay-off analysis chart prepared by the defendant, Westinghouse Electric Corporation, through its expert, Dr. Bernard Siskin), Mr. Parzick stated that he was older, had more seniority and was capable of performing job tasks of persons who remained on the payroll of Westinghouse Electric Corporation following his mandatory lay-off/retirement on December 17, 1982. Mr. Parzick further stated that he was forced to accept the pension option instead of severance because the

terms were far more favorable and was as a result of that selection not entitled to recall at Westinghouse.

Mr. Parzick finally explained that he was advised by the head of his department, Thomas Kinlin, that the personnel manager for the division, Nicholas Kulokoski, suggested defendant proceed with the elimination of the Negotiation Engineers' group despite the suggestion that Westinghouse was engaged in "something illegal" and that Mr. Kulokoski further proffered that they should give it a try "for what do we have to lose."

William J. Haessler was born on October 13, 1927 and advised the jury that he was 58 years old at the time of trial. Mr. Haessler explained that he received a Bachelor of Science in Engineering from Drexel University and first joined the defendant, Westinghouse Electric Corporation, on January 23, 1947. Mr. Haessler outlined his broad experience at Westinghouse Electric Corporation and gave a detailed account of his ability to perform various job tasks including all job duties of Availability Assurance Engineers at Westinghouse. Mr. Haessler further explained that work had been taken from him beginning in 1977 and given to a new job position established in the department — Availability Assurance Engineer. Mr. Haessler also testified that the differences in the job responsibilities for Negotiation Engineers and Availability Assurance Engineers were not significant. In summary, Mr. Haessler testified that he was older and had greater seniority than all those Availability Assurance Engineers who remained at Westinghouse after the lay-off, and that these gentlemen had in fact assumed the duties he performed prior to his lay-off on December 17, 1982.

Earle Williams was 62 years old at the time of trial and was born on August 19, 1923. He received a Bachelor of Science in Electrical Engineering at the University of New Hampshire and on July 26, 1949 started with Westinghouse Electric Corporation as an engineer. Mr. Williams set forth his work history at the

defendant corporation averring that from 1977 work previously assigned to him as a Negotiation Engineer was reassigned to persons in the Availability Assurance Engineer job family. Mr. Williams stated that he was older than all the Availability Assurance Engineers who remained at Westinghouse Electric Corporation after his discharge and that he had more seniority than each when he was laid off on December 17, 1982. Mr. Williams explained that he selected a pension option rather than severance from the company since he was advised there was no chance of recall and the economic effect of selecting the latter would have been too great. Mr. Williams testified emphatically that Availability Assurance Engineers and Negotiation Engineers did effectively the same work and that Availability Assurance Engineers and some members of management took over his work and the work of other Negotiation Engineers following the lay-off.

Plaintiff, Richard Carner, was 57 years old at the time of trial and was born on August 30, 1928. He started at Westinghouse on July 2, 1951 and had extensive work history and experience with the company including jobs that required the extensive use of technology. He stated without reservation that he had the ability to perform the work of Availability Assurance Engineers at the time he was discharged on December 17, 1982 and that he was older and had greater seniority than all of the Availability Assurance Engineers that remained.

Lal R. Bhaya was 61 years old at the time of trial and was born on October 10, 1924. Mr. Bhaya received his Bachelor of Science in Electrical Engineering at the University of Bombay in 1947 and started with the defendant on December 1, 1966. Mr. Bhaya proffered that he was fully capable of doing work of Applications Engineers at the time he left and that in fact Applications Engineers and some management personnel took over his work. He also stated that he was older than all

the Applications Engineers and persons in management who took over his work and that in fact he had previously done the work of Applications Engineers.

Plaintiffs' position was further presented through the testimony of Dr. Richard Andrulis, a qualified expert in the trial analysis of statistics in the workplace. After acceptance by the court of his qualifications as an expert, Dr. Andrulis testified that age was a determining factor in the elimination of the job family of Negotiation Engineers basing that opinion on a family-by-family analysis of all positions affected by the lay-off. Dr. Andrulis further proffered that his examination of the job descriptions of Availability Assurance Engineers and Negotiation Engineers demonstrated that the responsibilities and requirements for each were very similar. Dr. Andrulis also suggested that the method which could have been used to effect the lay-off without any age bias was to retain those persons in the job families of Availability Assurance Engineer or Applications Engineer or Negotiation Engineer who had the highest seniority. Importantly, he stated there was direct financial benefit to Westinghouse to discharge older workers rather than younger ones and testified from his analysis of seniority that plaintiffs would have remained in the employ of Westinghouse had their job family not been eliminated.

Dr. Andrulis' family-by-family analysis was supported through the testimony and exhibits of Dr. Bernard Siskin, defendant's statistical expert. Dr. Siskin pointed out that the average age of Availability Assurance Engineers at the end of 1962 was 35.8 and that they had been terminated as a family at the rate of 29.4%. Conversely, the average age of Negotiation Engineers at the end of 1982 was 48.9 and that they were terminated at the rate of 93.3%. This disparity was further highlighted by inspection of the average age of engineers generally of 41.8 years and their termination rate of 41%. Dr. Siskin stated that on December 17,

1982 there were 17 Availability Assurance Engineers and that only five were terminated, while there were 15 Negotiation Engineers and 14 were terminated.

The attempts by the defendant to counter the extensive and convincing evidence presented by the plaintiff was adjudged by the jury to be ineffective and incredible.

In an attempt to counter the damaging testimony of Henry Parzick, Thomas Kinlin, plaintiffs' supervisor at the time of their termination, testified that he did not recall attending any executive meetings with Mr. Kulokoski where lay-offs were discussed. His statements in that regard were countered by his further testimony that the occurrence of such a meeting and the statements proffered by plaintiff, Henry Parzick, were "not impossible", and that he did "believe Hank" and "don't think he's lying."

Chester Turnbull, a Manager of Labor Relations for defendant, also supported plaintiffs' position. While he asserted that the five plaintiffs could not cross job progressions to "bump" any of the remaining younger engineers, he clearly admitted that duties could be transferred from one group of engineers to another without a violation of the controlling contract.

James Borden, Manager of the Availability Assurance Department with responsibility for both Availability Assurance and Negotiation Engineers during the time plaintiffs were laid off, supplied the most revealing (and most damaging to the defendant) testimony relating to the lay-off process at defendant's facility. He advised that during 1982 he was involved in the complicated process of planning, preparing and effecting lay-offs, made a decision that Negotiation Engineers were not necessary to the continued operation of the department, and implemented a complex severance program. Yet he did not provide any documentation of his decisions or proffer any proof of declining sales or the lack of ability

or accomplishment of the individual plaintiffs. Mr. Borden, like Mr. Turnbull, could not specify any contractual restriction prohibiting the retention of plaintiffs by allowing an interchange of job tasks.

ARGUMENT

The present request for the issuance of a Writ of Certiorari is dependent upon a showing by petitioner that the United States Court of Appeals for the Third Circuit improperly applied standards governing review of the granting of judgment notwithstanding the verdict of the jury and the sufficiency of evidence presented by plaintiffs in the court below. Even the most cursory reading of Judge Mansmann's well-reasoned opinion reveals that the Court of Appeals for the Third Circuit properly reversed the district court which had failed to benefit plaintiffs with the resolution of all factual issues in their favor.

I. THE COURT OF APPEALS APPLIED UNIVERSALLY ACCEPTED PRINCIPLES OF LAW GOVERNING ACTIONS UNDER THE AGE DISCRIMINATION IN EMPLOYMENT ACT.

In this context, petitioner suggests that this Court must review and reverse the decision below because the Court of Appeals erred in the application of legal standards espoused by this Court and various courts of appeal relating to actions under the Age Discrimination in Employment Act. More specifically, petitioner complains the Court of Appeals erred by a misapplication of evidentiary standards in the context of this specific age discrimination case. It is suggested that these contentions are unsupported in the record and do not support a review by this Court. To the contrary, under universally settled principles, it is quite apparent that the Court of Appeals for the Third Circuit properly held that the plaintiffs affirmatively carried their ultimate burden in

establishing that age was a determining factor in the decision to eliminate the position of Negotiation Engineer.

Under the guidelines of *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973), a plaintiff can only recover under the ADEA if he or she presents proof by a preponderance of the evidence that age was a determining factor in the employer's decision. See also *Smithers v. Bailar*, 629 F.2d 892 (3d Cir. 1980) and *Lewis v. University of Pittsburgh*, 725 F.2d 910 (3d Cir. 1983), cert. denied 469 U.S. 892 (1984).

This standard permits a plaintiff to initially establish a *prima facie* case of unlawful discrimination by demonstrating that plaintiff was a member of the protected class and that he/she was laid off from his/her job for which he/she was qualified, while others outside the protected class and/or younger than plaintiff were more favorably treated. See *Massarsky v. General Motors Corp.*, 706 F.2d 111 (3d Cir.), cert. denied, 464 U.S. 937 (1983), as cited in *Berndt v. Kaiser Aluminum & Chemical Sales, Inc.*, 789 F.2d 253 (3d Cir. 1986).

Once the plaintiff has established a *prima facie* case of age discrimination, the burden then shifts to the defendant to dispel the adverse inference of age discrimination by articulating a legitimate non-discriminatory reason for the lay-off. *Texas Department of Community Affairs v. Burdine*, 450 U.S. 248 (1981); *Massarsky v. General Motors Corp., supra; Smithers v. Bailar, supra.* After the defendant has satisfied that requirement, the ultimate burden is said to remain with the plaintiff to prove that the defendant intentionally discriminated against the plaintiffs. The necessary showing of pretext, can be demonstrated by either *directly* persuading the court that a discriminatory reason was the more likely motivation or by *indirectly* showing that the explanation proffered by the employer was unworthy of credence. *United States Postal Service Board of Governors v. Aikens*, 460 U.S. 711 (1983); *Texas Department of*

Community Affairs v. Burdine, supra; Berndt v. Kaiser Aluminum & Chemical Sales, Inc., supra; Duffy v. Wheeling Pittsburgh Steel Corp., 738 F.2d 1393 (3d Cir.), cert. denied 469 U.S. 1087 (1984).

In the present case, it is apparent that the Court of Appeals properly held that the plaintiffs produced sufficient evidence to sustain the ultimate burden in accordance with the afore-cited authority. They did so by *affirmative evidence* and the *lack of credibility of defendant's position* that age was in fact a determining factor in their lay-off.

First, the "legitimate, non-discriminatory reasons" set forth by James Borden, Manager of plaintiffs' department at time of termination, were totally unsupported by any documentary or objective evidence. Mr. Borden stated throughout his testimony that no writings were available to support the position taken by the company that Negotiation Engineers were in fact the most expendable, and that no objective criteria was used in making this decision. It was, according to Mr. Borden, felt to be the best method to weather the storm and best prepare the company for the future when it was hoped that the business climate would change sometime at or near the turn of the century.

Contrary to this unsupported position, each plaintiff testified extensively as to the interchangeability of job tasks and the fact that he was fully qualified to remain as an employee at Westinghouse and accept job tasks from other less senior employees who were not within the protected class. No credible evidence was adduced by defendant which would have supported the averment that the transfer of job tasks was precluded by collective bargaining. In fact, both Messrs. Borden and Chester A. Turnbull, Manager of Labor Relations and Manager of the Wage and Salary Administration at the defendant company, were unable to specify any contractual requirement disallowing the interchangeability of job tasks where those tasks fit within the job description of

the individual. It should be noted in this regard that the exhibits submitted by plaintiffs relating to the job descriptions of Negotiation Engineers, Availability Assurance Engineers and Applications Engineers clearly demonstrated a similarity of tasks which would have permitted interchangeability without union bargaining. In affirmative support of their position, plaintiffs submitted the testimony of Dr. Andrulis who stated that the job descriptions of both Negotiation Engineers and Availability Assurance Engineers demonstrated a very similar status in job responsibility and requirements.

The credibility of the defendant was also placed in question by the ease of which satisfaction of the requirements of the ADEA could have been met. Dr. Andrulis testified (as supported by the documentation presented in P-8) that a strict seniority basis in each job family (without the elimination of an entire job family) would have provided Westinghouse with an ample work force capable of carrying out all tasks which were being performed on the day the plaintiffs were terminated. Dr. Andrulis fueled further question of defendant's real motives through his testimony that there was substantial financial benefit to Westinghouse to discharge older workers rather than younger ones.

Most importantly, the issue of pretext in the elimination of the job family of Negotiation Engineers was answered directly by Dr. Andrulis who proffered that the actions of Westinghouse were clearly revealed to be discriminatory when one viewed the impact on older workers on a job family-to-job family basis. Dr. Andrulis' analysis in this regard is supported by the statistical information presented in P-8 as analyzed by Dr. Siskin who agreed that the class of engineers most dramatically affected by the lay-off, Negotiation Engineers (they were terminated at a 93.3% rate as opposed to a 29.4% rate for Availability Assurance Engineers) were substantially

older than other retained job families (48.9 years compared to 35.8 years for the average age of Availability Assurance Engineers).

Lastly, the testimony of Mr. Parzick revealed that high level managers at Westinghouse were aware that the plan to eliminate the job family of Negotiation Engineer might be "illegal" (discriminatory) but decided to take a chance in that regard.

Adherence to a mechanistic evaluation of plaintiffs' evidence in an action under the ADEA has been universally rejected.

> The 'factual inquiry' in a Title VII case is '[whether] the defendant intentionally discriminated against the plaintiff.' *Burdine, supra,* at 253, 101 S. Ct., at 1093. In other words, is 'the employer . . . treating "some people less favorably than others because of their race, color, religion, sex, or national origin." ' *Furnco Construction Corp. v. Waters,* 438 U.S. 567, 577, 98 S. Ct. 2943, 2949, 51 L. Ed. 2d 957 (1978), quoting *Teamsters v. United States,* 431 U.S. 324, 335, n. 15, 97 S. Ct. 1843, 1854, n. 15, 52 L. Ed. 2d 396 (1977). The prima facie case method established in *McDonnell Douglas* was 'never intended to be rigid, mechanized, or ritualistic. Rather, it is merely a sensible, orderly way to evaluate the evidence in light of the common experience as it bears on the critical question of discrimination.' *Furnco, supra,* 438 U.S., at 577, 98 S. Ct. at 2949. *Where the defendant has done everything that would be required of him if the plaintiff had properly made out a prima facie case, whether the plaintiff really did so is no longer relevant. The district court has before it all the evidence it needs to decide whether 'the defendant intentionally discriminated against the plaintiff.' Burdine, supra,* 450 U.S., at 253, 101 S. Ct., at 1093. *United States Postal Service Board of*

> *Governors v. Aikens*, 460 U.S. at 715 (1983), (Emphasis added).

Certainly, this reasoning in *Aikens* has been adopted as to age claims in the Third Circuit.

> *Thus, once the district court denied Kaiser's motion for directed verdict and ordered that the case proceed, the focus of inquiry shifted to deciding the ultimate discrimination issue. Accordingly, we find it unnecessary at this point in time to decide whether or not a prima facie case had, in fact, been established by the plaintiff.* Rather, we must review whether or not the plaintiff sustained his *ultimate* burden of proving discrimination, or in other words, that his age was a determinative factor in Kaiser's decision to terminate him. *Berndt v. Kaiser Aluminum & Chemical Sales, Inc., supra*, 789 F.2d at 257. (Emphasis added).

See also *Jayasinghe v. Bethlehem Steel Corp.*, 760 F.2d 132 (7th Cir. 1985) and *Duffy v. Wheeling Pittsburgh Steel Corp., supra.*

It is apparent, therefore, that the U. S. Court of Appeals for the Third Circuit correctly held that allowing to the plaintiffs the advantage of every fair and reasonable inference from the evidence presented and exposing the evidence presented and exposing the evidence to the strongest light favorable to the party against whom the Motion is made (i.e., plaintiffs), as a matter of law the record is not critically deficient of that minimum quantity of evidence from which a jury might reasonably afford relief. See *Hanslovan v. Pennsylvania Mines Corp.*, 603 F. Supp. 464 (W.D. Pa. 1985), aff'd. 791 F.2d 917, 791 F.2d 918 (3d Cir. 1986), citing *Danny Kresky Enterprises Corp. v. Magid*, 716 F.2d 215 (3d Cir. 1983).

II. THE COURT OF APPEALS PROPERLY HELD THAT THE TRIAL COURT ERRED IN USURPING THE FUNCTION OF THE JURY.

A Rule 50(b) motion for judgment notwithstanding the verdict of the jury requires a district court judge to determine whether the evidence and justifiable inferences most favorable to the prevailing party afford any rational basis for the verdict. *Berndt v. Kaiser Aluminum & Chemical Sales, Inc., supra; Zegan v. Central R.R. Co. of NJ*, 266 F.2d 101 (3d Cir. 1959). Under such circumstances, the motion may be granted only if, as a matter of law, the record is critically deficient of that minimum quantity of evidence from which a jury might reasonably afford relief. *Dudley v. South Jersey Metal, Inc.*, 555 F.2d 96, 101 (3d Cir. 1977).

> These motions require a judge to test the body of evidence not for its insufficiency to support a finding, but rather for its overwhelming effect. He must then be able to say not only that there is sufficient evidence to support the finding, even though other evidence could support as well a contrary finding, but additionally that there is insufficient evidence for permitting any different finding. *Massarsky v. General Motors Corp.*, 706 F.2d at 119.

See also *Fireman's Fund Insurance Co. v. Vidafreeze Corp.*, 540 F. 2d 1171 (3d Cir.), cert. denied 429 U.S. 1053 (1977).

When considering a motion for judgment notwithstanding the verdict, the trial court must review the evidence in the light most favorable to the party against whom the motion is made and give the respondent the advantage of every fair and reasonable inference. See *Danny Kresky Enterprises Corp. v. Magid, supra*, and *Inventive Music, Ltd. v. Cohen*, 617 F.2d 29 (3d Cir. 1980). See also *Ripee v. Grand Valley Mfg Co.*, 762 F.2d 25 (3d Cir. 1985).

The standard by which the Court of Appeals must examine a grant or denial of a motion for judgment notwithstanding the verdict is identical to that which is required to be employed by the trial court as set forth above. See *Berndt v. Kaiser Aluminum & Chemical Sales, Inc., supra; Danny Kresky Enterprises Corp. v. Magid, supra; Fireman's Fund Insurance Co. v. Vida-freeze Corp., supra.* See also *Boutros v. Riggs Nat'l. Bank, D.C.*, 655 F.2d 1257 (D.C. Cir. 1981) and *H. C. Blackwell Co., Inc. v. Kenworth Truck Co.*, 620 F.2d 104 (5th Cir. 1980).

These standards were not, as suggested by petitioner Westinghouse, altered by this Court's holding in *Anderson v. Liberty Lobby, Inc.*, ____*U.S.* ____, 106 S. Ct. 2505 (1986). That decision restated the requirement that a plaintiff, when presented with a motion for summary judgment, is required to present affirmative evidence in support of allegations in the Complaint. Inapposite to the factual basis of that decision, plaintiffs herein clearly presented affirmative evidence of age discrimination from which a jury could find that age was a determining factor in their discharge.

In overturning the trial court's granting of defendant's motion for judgment notwithstanding the verdict, the Court of Appeals adhered to the clear requirement contained in the litany of cases cited above that the resolution of all factual conflicts is a jury function. The trial court, in summary, had improperly set aside the verdict based upon its analysis that plaintiffs' burden had not been met in three crucial areas:

> (1) plaintiffs did not prove that they could have remained and accepted responsibility for the transfer of tasks from terminated engineers in other categories;
>
> (2) plaintiffs did not demonstrate that the testimony of James Borden was unworthy of credence; and

(3) plaintiffs' expert witness drew "utterly ridiculous" statistical comparisons about age discrimination that precluded the jury from relying on his testimony and rendering its verdict.

A. It Was Reasonable for the Jury to Infer That Plaintiffs Could Have Assumed Transfer of Job Duties.

The trial court improperly characterized plaintiffs' proffered evidence that their duties were similar to those performed by Availability Assurance and Applications Engineers and that therefore, they could have accepted transfer of job duties instead of being terminated, as "hopelessly vague and contradictory." The trial court, while conceding that the jury could have reasonably inferred from the evidence that "there was some degree of similarity, and perhaps some overlap in job duties", nevertheless and as stated by the Third Circuit Court of Appeals inexplicably opined that a jury's inference of the possibility of task interchange from such evidence "would be pure speculation."

Such second guessing for the purpose of deciding a motion for judgment notwithstanding the verdict is an impermissible invasion of the jury's province. As this Court originally observed in *Schulz v. Pennsylvania R.R. Co.*:

> The very essence of [the jury's] function is to select from among conflicting inferences and conclusions that which it considers most reasonable. Fact finding does not require mathematical certainty. Jurors are supposed to reach their conclusions on the basis of common sense, common understanding and fair beliefs, grounded on evidence consisting of direct statements by witnesses or proof of circumstances from which inferences can fairly be drawn. [Footnotes omitted]. *Schulz v. Pennsylvania R.R. Co.*, 350 U.S. 523, 526 (1956).

See also *Fireman's Fund Ins. Co. v. Vidafreeze Corp.*,

supra, at 1178 ("It is the function of the trier of fact alone, the jury in this instance, to evaluate contradictory evidence and to draw inferences therefrom"); *Metrocare v. Washington Metropolitan Area Transit Authority*, 679 F.2d 922, 928 (D.C. Cir. 1982) ("The issue of discrimination was for the jury, not the judge, and the absence of direct evidence of this specific kind is not determinative. A reasonable jury could apply common sense and general experience to the hard facts it found").

Since each of the plaintiffs and Dr. Andrulis testified that the union contract and the circumstances present at their termination permitted the transfer of job duties to them, a finding that plaintiffs could have been given duties from job progressions not slated for elimination was clearly "an inferential leap that the jury was permitted to make in light of the evidence before it." *Danny Kresky Enterprises Corp., supra*, 716 F.2d at 212.

In *Berndt v. Kaiser Aluminum & Chemical Sales, Inc., supra*, the plaintiff alleged that the employer had engaged in discrimination by, *inter alia*, "not follow[ing] its policy of attempting to place terminated, salaried employees in other employment or to retire when possible." In that case, although the employer presented evidence at trial that established that the plaintiff was at least qualified at the time the required reduction in force took place, the Court of Appeals refused to permit interference with the jury's finding that age was a determinative factor in the plaintiffs' discharge and held that it was a reasonable inference. Similarly, in this case, the defendant presented no expert or documentary evidence to directly counter plaintiffs' assertion that job tasks could be interchanged, but relied instead on assertions made by Messrs. Turnbull and Borden that the transfer of job function was not possible under the prevailing Collective Bargaining Agreement and that the jobs were so dissimilar so as not to allow interchangeability of job tasks. As discussed above, neither of

defendant's witnesses could point to any specific clause or language in the applicable contracts controlling their opinion and neither had any documentation of his opinion regarding the dissimilarity of job duties. It is clear, therefore, that the jury could accept the affirmative statements of plaintiffs and their expert and completely reject the contrary assertions of the defendant. Certainly, plaintiffs' assertions clearly formed permissible fodder for a jury's inference of age discrimination. See *Freeman v. Franzen*, 695 F.2d 485, 489 (7th Cir. 1982).

B. The District Court Impermissibly Determined That Plaintiffs Had Not Sufficiently Demonstrated Pretext.

In justifying its action, the trial court below concluded that plaintiffs had not eliminated defendant's proffered justification for eliminating plaintiffs' jobs and therefore, had not demonstrated pretext. It further held that plaintiffs' contentions that Mr. Borden's testimony lacked credibility were "specious" and constituted "rank speculation". The Third Circuit Court of Appeals correctly stated that this adjudication by the trial court violated the most basic tenets of the separation of function of court and jury.

It is axiomatic that "in considering a motion for judgment notwithstanding the verdict, [a Court is] not free to weigh the evidence, *pass on the credibility of the witness*, or substitute [its] judgment of the facts for that of the jury." *Blair v. Manhattan Life Ins. Co.*, 692 F.2d 296, 300 (3d Cir. 1983) [emphasis added]. "The trial court may not assess the credibility of the witnesses or weigh the evidence." *Metrocare v. Washington Metropolitan Area Transit Authority, supra*, 679 F.2d at 925; *Freeman v. Franzen, supra*, 695 F.2d at 488. The same holds true in an appellate court's consideration of the disposition of a Motion: "[a]t least two factors are outside the parameters of either court's view — the *credibility of*

the evidence and the weight of it." *Fireman's Fund Insurance Co. v. Vidafreeze, supra,* 540 F.2d at 1179 [emphasis added]. These admonitions are particularly apt in the present case since Mr. Borden's credibility hinged entirely on his oral testimony without any documentation or other support.

In a highly analogous factual circumstance, the Court of Appeals for the District of Columbia held that an employer's attempt to rebut a charge of racial discrimination by proffering various testimony of past or current employees, officers and owners of the company, constituted insufficient grounds to support a motion for judgment notwithstanding the verdict. *Carter v. Duncan-Higgins, Ltd.,* 727 F.2d 1225 (D.C. Cir. 1984). After noting that the weighing of conflicting evidence and the evaluation of witness credibility is exclusively within the jury's province, the court explained its reasoning:

> For the most part, the only evidence of [the Employer's] intent was oral testimony: the explanations were without support of extensive evidence. For example, there was no internal memorandum [supporting employer's position].
>
> The weight to be given to these offered business justifications thus required an evaluation of witness credibility. And, an evaluation of witness credibility is the exclusive function of the jury. *Indeed, where the only evidence of intent is oral testimony, a jury could always choose to discredit the proffered explanation . . . .*
>
> Because the strength of the purported business reason — and indeed the strength of the Company's case — was thus inextricably inter-related to questions of witness credibility, the case had to go to the jury. *Carter v. Duncan-Higgins, Ltd., supra,* 727 F.2d at 1234 [emphasis added].

Similarly, in the present matter, defendant presented no documentary evidence to support its statement that the Negotiation Engineer position could be profitably eliminated. Although the trial court in the present case scoffed at any claim that such an omission could weaken the credibility of Mr. Borden, it is clear that the court in *Carter v. Duncan-Higgins, Ltd., supra*, found a similar lack of documentation *highly* illuminating on the issue of employer credibility.

Finally, the district court chastised plaintiffs' counsel for calling into question the credibility of Mr. Borden because of a statement he made on cross-examination, characterizing the actions of plaintiffs' counsel as "rank speculation". Under parallel circumstances, the Court of Appeals for the Eleventh Circuit in *Lindsey v. American Cast Iron Pipe Company*, 772 F.2d 799 (11th Cir. 1985) reversed a judgment notwithstanding the verdict granted to defendant in an age discrimination case noting that "in order to refute successfully the defendant's articulated reason for non-selection, a plaintiff may rely solely on his initial evidence combined with evidence elicited from the defendant on cross-examination." *Lindsey v. American Cast Iron Pipe Co.*, 772 F.2d at 802, n. 1. In such situations, that court observed that the case was basically a "credibility contest", thus making it inappropriate to disturb the jury's verdict. *Id.* Accordingly, it was clearly appropriate for plaintiffs' counsel to draw the jury's attention to a remark made by Borden under cross-examination and it was equally proper for the jury to employ the remark in gauging Borden's credibility.

C. The District Court Impermissibly Weighed the Credibility of Plaintiffs' Expert Witness.

In setting aside the jury verdict, the trial court below impermissibly relied on its observation that the comparisons made by plaintiffs' expert and the conclusions he

drew from them were "so obviously non-sensical" and "utterly ridiculous", that any reliance upon them by the jury was impermissible. Such action completely contravenes the jury's function to weigh the evidence and assesses credibility and is, in the context of considering a motion for judgment notwithstanding the verdict, a clear abuse of discretion. See *Blair v. Manhattan Life Ins. Co., supra; Fireman's Fund Insurance Co. v. Vidafreeze, supra; Metrocare v. Washington Metropolitan Area Transit Authority, supra;* and *Freeman v. Franzen, supra.* See also *Lust v. Clark Equipment Co., Inc.,* 792 F.2d 436 (4th Cir. 1986) where the Court of Appeals for the Fourth Circuit reversed a judgment notwithstanding the verdict entered in favor of the defendant in a tort action, noting as follows:

> "To set aside the verdict of the jury, a court would have either to disbelieve Lust's expert or to attach little weight to his testimony. But granting judgment notwithstanding the verdict on these grounds would violate the principles [of deference to the jury's determination of weight of evidence]. We agree with the Fifth Circuit that '[i]t was for the jury to decide which of the experts was more credible, which used the most reliable data, and whose opinion — if any — the jury would accept." *Lust v. Clark Equipment Co.,* 792 F.2d, at 439, quoting *Grenada Steel Industries, Inc. v. Alabama Oxygen Co., Inc.,* 695 F.2d 883 (5th Cir. 1983).

Similarly, in *Borras v. Sea-land Service, Inc.,* 586 F.2d 881, 884 (1st Cir. 1978), a judgment entered notwithstanding the verdict was overturned on the ground that the district court, in granting the motion, had impermissibly ruled that the plaintiff's expert opinion was "based upon nothing more than mere suspicion and conjecture, and [was] entirely too speculative to support the verdict." In that case, the Court of Appeals noted that the expert's professional credentials were adequate for him to be

allowed to testify and that in fact he had been permitted to testify as an expert. The court therefore concluded that his opinion became part of the corpus of the evidence before the jury and that the judge could not substitute his own views of credibility for the finder of fact.

Similarly, in the instant case, Dr. Andrulis' professional credentials were not challenged, and he was allowed to testify. Thus, despite the lower court's response to this expert's conclusions, his testimony formed an important part of the corpus of the evidence before the jury which then became the sole arbiter of the validity and worth of that evidence.

CONCLUSION

In sum, the Court of Appeals properly ruled that "the trial judge in the instant case invaded forbidden territory . . . in his review of the evidence although he articulated an understanding of the constraints of his review." *Fireman's Fund Insurance Co. v. Vidafreeze, supra*, 540 F.2d at 1178. The attack upon plaintiffs' inability to meet their ultimate burden was improper in the context of deciding a motion for judgment notwithstanding the verdict and was appropriately not permitted by the Court of Appeals for the Third Circuit. No issue of law has been raised by petitioner herein to permit a review of the decision of the Court of Appeals beyond a re-analysis of the facts as concluded by the jury. Plaintiffs therefore respectfully request the denial of the Petition for the issuance of the Writ of Certiorari, thereby permitting this matter to be remanded to the district court to proceed in accordance with the instructions of the Court of Appeals for the Third Circuit.

Respectfully submitted,

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No. 87-1448

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1987

WESTINGHOUSE ELECTRIC CORPORATION,
Petitioner

v.

LAL R. BHAYA,
RICHARD CARNER,
WILLIAM J. HAESSLER,
HENRY A. PARZICK, and
EARLE WILLIAMS,
Respondents

REPLY BRIEF TO THE BRIEF IN OPPOSITION TO THE PETITION FOR CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

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TABLE OF CONTENTS

	Page
TABLE OF AUTHORITIES	ii
COUNTERSTATEMENT OF FACTS	1
ARGUMENT	4
I. The Court of Appeals Did Not Apply the Correct Standards	4
II. In Granting the Judgment N.O.V., the District Court Did Not Improperly Usurp the Function of the Jury	6
III. Plaintiffs Did Not Show Pretext	6
IV. The District Court's Assessment of the Expert Evidence Was Proper and Correct.	9
CONCLUSION	10

TABLE OF AUTHORITIES

Cases:	Page
Anderson v. Liberty Lobby, Inc., 477 U.S. 246 (1986)	9
Borras v. Sea-Land Service, Inc., 586 F.2d 881 (1st Cir. 1978)	9
Branson v. Price River Coal Co., ___ F.2d ___, 46 FEP Cases 1003 (10th Cir. 1988)	5
Carter v. Duncan-Huggins, Ltd., 727 F.2d 1225 (D.C. Cir. 1984)	6, 7
EEOC v. Federal Reserve Bank of Richmond, 698 F.2d 633 (4th Cir. 1983), *rev'd on other grounds*, 467 U.S. 867 (1984)	9, 10
Kephart v. Institute of Gas Technology, 630 F.2d 1217 (7th Cir. 1980), *cert. denied*, 450 U.S. 959 (1981)	5
Lindsey v. American Cast Iron and Pipe Co., 772 F.2d 779 (11th Cir. 1985)	7, 8
Maxfield v. Sinclair International, 766 F.2d 788 (3d Cir. 1985), *cert. denied*, 474 U.S. 1067 (1985)	7
McDonnell Douglas Corporation v. Green, 411 U.S. 792 (1973)	7
Smith v. Flax, 618 F.2d 1062 (4th Cir. 1980)	5
RULES	
Sup. Ct. R. 22.5	1

Rule 22.5 of the Rules of the Supreme Court provides that a petitioner may file a reply brief to respond to issues first raised in the brief in opposition. In this case, the brief in opposition, which has been styled "Response to Petition For Writ of Certiorari to the United States Court of Appeals for the Third Circuit," largely ignores the arguments made in support of the petition for certiorari and focuses instead on why plaintiffs believe the Court of Appeals for the Third Circuit correctly reversed the judgment notwithstanding the verdict. Although the brief in opposition is inappropriate, it nonetheless raises new issues which must be addressed.

COUNTERSTATEMENT OF THE FACTS

The recitation of the "facts" of this case found in the brief in opposition contains significant distortions of the record. In describing their own testimony, plaintiffs omit important inconsistencies. For example, while it is true that plaintiff, Henry Parzick, testified at trial that the jobs of Negotiation Engineer ("NE") and Availability Assurance Engineer ("AAE") were virtually interchangeable, this testimony directly contradicted statements made by him at his pretrial deposition. Defendant Westinghouse introduced at the trial the following testimony from Parzick's deposition:

> Q: Do you have any reason to believe that they [the Availability Assurance Engineers] were doing the same work that you were doing or different work?
>
> A: Their line of work was entirely different from mine. As I said, I assisted these people on a lot of their work.

(190a)[1]

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1. This is a reference to the record below, as submitted to the court of appeals. All such further references in this brief will include a number, followed by a lowercase "a".

The description of the testimony of Henry Parzick regarding the alleged statements of his supervisor, Thomas Kinlin, also is not accurate. The brief in opposition describes this testimony about alleged statements of Kinlin as follows:

> ". . . the testimony of Mr. Parzick revealed that high level managers of Westinghouse were aware that the plan to eliminate the job family of Negotiation Engineer might be "illegal" (discriminatory) but decided to take a chance in that regard."

(Brief in Opposition at p.12)

The following is the relevant testimony of record:

> A: Mr. Kinlin told me that at a meeting that management held at which he was present, a discussion was held regarding our termination. Somebody in that meeting brought up the point that they might be violating the labor laws of their contract.

(168a)

* * *

> A: A statement was made that maybe we [Westinghouse] shouldn't be eliminating this group [Negotiations engineers]. Maybe we're doing something illegal or against the contract, and Mr. Nick Kulokoski, who was the personnel manager of the division, said, let's give it a try. What do we have to lose?

(173a)

This testimony does not support plaintiffs' claim that a Westinghouse official described the decision to eliminate the position of NE as potentially discriminatory. In reversing the judgment n.o.v., the Third Circuit did not even mention this evidence.

William Haessler, another plaintiff, testified that he could do the work done by the AAEs. (238a-240a) On cross-examination, however, Mr. Haessler acknowledged that at the time of his layoff in December of 1982,

the job duties of the two positions were different. (262a-263a) Similarly, plaintiff, Earle Williams, testified that in 1982 there were differences between the job of AAE and NE. (360a)

Plaintiff, Richard Carner, also testified that at the time of his layoff in December 1982 his job was different from that of the AAEs. Indeed, at that time he was not even doing the work being done by the other NEs. (401a, 414a-416a) Mr. Carner also testified in a contradictory manner about his qualifications to do the work of the AAEs. Initially, he testified that he was more qualified than the AAE whose job he said he should have been given. Thereafter, he conceded that the AAE in question was more proficient at the job since he had been doing it. (423a) Also, Mr. Carner first testified that he was familiar with the work of the AAEs; however, subsequently he acknowledged: . . . I [didn't] know what their proficiency was. I wasn't in contact with them. I was doing work of my own, working with them. I wasn't watching what they were doing." (424a)

Plaintiff, Lal Bhaya, also gave the conflicting testimony about the similarity of his job duties to those of the Applications Engineers, the group of younger employees whom he identified as being treated more favorably than he. Bhaya first said that his work was the same as their work. Later, he testified that he didn't know exactly what the Applications Engineers did. (390a-392a)

The brief in opposition also mischaracterizes the testimony of plaintiffs' expert witness, Dr. Richard Andrulis. While it is true that Andrulis initially testified that, based on his review of job descriptions for the AAEs and the NEs, that the two jobs had similar responsibilities or requirements, this testimony was beyond the scope of Andrulis' alleged expertise. Plaintiffs offered him as an expert in the "area of industrial management and statistics" (295a), not as an expert on the nature of engineering jobs at Westinghouse. Indeed, Andrulis admitted that he did not do a "formal job analysis" of the

AAE position and that his only knowledge of the skills necessary for the two jobs was based on reading the job descriptions. (342a) Therefore, the contention in the brief in opposition that the testimony of Dr. Andrulis constituted evidence upon which the jury reasonably could have found that the duties of the two job positions were "interchangeable" is erroneous.

The brief in opposition also inaccurately describes the testimony of defense witness, Chester Turnbull. Mr. Turnbull testified that the collective bargaining agreement did not allow a transfer of duties from one job progression to another if the transfer necessitated a change in the job description. Mr. Turnbull explained why he believed that the job description of the NEs would have to be changed if they were to assume the duties of the AAEs (664a-675a), and his testimony is uncontradicted.[2]

ARGUMENT

I. The Court of Appeals Did Not Apply The Correct Standards

In a section of the brief in opposition entitled "Argument," plaintiffs offer five reasons why the petition for certiorari should be denied. Only the first argument, that "the court of appeals applied universally accepted principles of law governing actions under the Age Discrimination in Employment Act," is responsive to the petition for certiorari. Plaintiffs assert that they produced affirmative evidence of age discrimination, but they do not

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2. A copy of the collective bargaining agreement (national agreement) was entered into evidence as defendant's Exhibit 23. Language in that agreement supports Turnbull's claim that Westinghouse could not have transferred duties from the AAEs to the NEs if that transfer was so substantial as to require a revision of the job descriptions for the two positions. (Section VI at pp. 10-11 of D-23)

identify any such evidence other than their own testimony that they were qualified to do the work being done by younger engineers who were retained. This does not amount to affirmative evidence that would carry plaintiffs' burden to show that the business reasons offered by Westinghouse were a pretext for age discrimination.

In *Branson v. Price River Coal Co.*, ____ F.2d ____, 46 FEP Cases 1003 (10th Cir. 1988), the Tenth Circuit rejected similar evidence offered by the plaintiff in that age discrimination case. The Court of Appeals affirmed a grant of summary judgment in favor of the employer on the basis that plaintiff had failed to create a genuine issue of material fact regarding the non-discriminatory reasons offered by defendant for its decision to lay off plaintiff. The Court noted:

> [Plaintiff] admits Mr. Anderson "felt" she was less qualified than Mr. Hanson for the accounting department's remaining position and claims only that she was in fact equally or more qualified than Mr. Hanson. As courts are not free to second-guess an employer's business judgment, this assertion is insufficient to support a finding of pretext. See *Kephart v. Institute of Gas Technology*, 630 F.2d 1217, 1223, 23 FEP Cases 1412 (7th Cir. 1980), *cert. denied*, 450 U.S. 959, 24 FEP Cases 1827 (1981). *It is the perception of the decision maker which is relevant, not plaintiff's perception of herself, Smith v. Flax*, 618 F.2d 1062, 1067, 22 FEP Cases 1202 (4th Cir. 1980).

Id. at 1005 (emphasis supplied)

Under this reasoning, plaintiffs' opinion that they were qualified to do the work of the younger engineers who were retained is not sufficient to show that the elimination of their jobs was the result of age discrimination.

II. In Granting the Judgment N.O.V., the District Court Did Not Improperly Usurp the Function of the Jury

Plaintiffs/respondents also argue that this Court should deny the petition for certiorari because the Third Circuit correctly found that the trial court impermissibly usurped the function of the jury. Plaintiffs contend that the jury could have reasonably inferred from the evidence that they could have assumed the job duties of the AAEs and therefore concluded that Westinghouse had committed age discrimination.[3] This argument misses the point.

Assuming *arguendo* that there was sufficient evidence to support an inference that the job duties of the AAEs could have been transferred to the NEs, this inference does not support a finding of age discrimination. The fact that the defendant *could have* made another business decision does not show that the defendant violated the ADEA. The statute does not require an employer to devise ways to retain older employees and lay off younger employees during a reduction in force.

III. Plaintiffs Did Not Show Pretext

Plaintiffs also argue that the district court "impermissibly determined that plaintiffs had not sufficiently demonstrated pretext." They allege that, in granting the judgment n.o.v., the trial court improperly weighed conflicting evidence and evaluated witness credibility. In support of this position, plaintiffs cite two cases, *Carter v. Duncan-Huggins Ltd.*, 727 F.2d 1225 (D.C.

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3. The following assertion in the brief in opposition is a complete distortion of the record:

> "Since each of the Plaintiffs and Dr. Andrulis testified that the union contract and the circumstances present at their termination permitted the transfer of job duties to them . . ."

(brief in opposition at p.17) None of the plaintiffs nor Dr. Andrulis testified about the collective bargaining agreement. Indeed, Dr. Andrulis admitted that he had never read it. (343a-344a)

Cir. 1984) and *Lindsey v. American Cast Iron and Pipe Co.*, 772 F.2d 779 (11th Cir. 1985), neither of which is relevant to this case.

In *Carter v. Duncan-Huggins, Ltd., supra*, the court of appeals affirmed the denial by the district court of a motion for a judgment n.o.v. because the evidence of record clearly supported a finding of discriminatory motive on the part of the defendant employer. Unlike the plaintiffs in this case, Ms. Carter offered evidence of numerous specific examples of disparate and unfavorable treatment of her by defendant. As the lone black employee of defendant employer, she was singled out for unique treatment in all aspects of her employment, including salary, customer contact, position of her work station, participation in staff meetings and fringe benefits. 727 F.2d at 1233.

By contrast, in the instant case, the evidence submitted by plaintiffs established only that they were older than some employees with similar skills who were retained by defendant. The Third Circuit has said that ". . . replacement by someone younger, without more, will not give rise to an inference of age discrimination . . ." *Maxfield v. Sinclair International*, 766 F.2d 788, 792 (3d Cir. 1985), *cert. denied*, 474 U.S. 1067 (1985).

Plaintiffs' reliance on the decision in *Lindsey v. American Cast Iron and Pipe Company, supra*, is also misplaced. The Eleventh Circuit reversed the granting of a judgment n.o.v. to defendant in that age discrimination case largely because the lower court had applied improperly the *McDonnell Douglas Corp. v. Green* test to a case where there was direct evidence of discrimination. 772 F.2d at 801-02. In *Lindsey*, plaintiff testified that his supervisor told him that he would not be considered for a promotion because the company was looking for a younger person for that job. This evidence, if believed by the jury, was direct evidence of age discrimination. *Id.* at 802. There is not any such direct evidence in this case.

Plaintiffs also cite the *Lindsey* decision for the proposition that a plaintiff may prove his case by his initial evidence combined with evidence elicited from the defendant on cross-examination. Mr. Borden said on cross-examination that "there is some opinion by industry experts that the turbine generator business might come back in this century." Based on that statement, plaintiffs' attorney argued to the jury that Borden laid off plaintiffs because they were older and would not be working when the business turned around in the year 2000. Plaintiffs now argue that the district court erred in rejecting this theory as "rank speculation." However, the court of appeals did not mention this evidence or any other evidence elicited on cross-examination of defense witnesses as a basis for reversing the judgment n.o.v.

Plaintiffs fail to address the crucial point made by the district judge; they did not offer any evidence refuting the reasons given by Borden for his decision to eliminate the job of NE. Plaintiffs assert that they offered affirmative evidence challenging the business justifications offered by Mr. Borden. They do not, however, point to any such affirmative evidence but instead merely argue that the jury was free to disbelieve Borden's testimony.

Plaintiffs also argue that it is significant that there was not any documentary evidence supporting Borden's testimony. The ADEA, however, does not require an employer to maintain written justifications for its actions. As the district court judge pointed out, plaintiffs did not submit any evidence establishing that Westinghouse customarily maintains written documents regarding its employment decisions. Absent such evidence, the failure of the company to keep writings regarding the elimination of the NE position is not remarkable and is certainly not evidence of age discrimination.

IV. The District Court's Assessment of the Expert Evidence was Proper and Correct

Plaintiffs also argue that the district court impermissibly weighed the credibility of plaintiffs' expert witness. While it is true that in considering a motion for judgment n.o.v., a court may not weigh evidence or evaluate witness credibility, it must nonetheless determine "[i]f *reasonable* minds could differ as to the import of the evidence . . ." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 246, 252 (1986) (Emphasis supplied). This determination necessarily involves some evaluation of the evidence.

Plaintiffs contend that the trial judge abused his discretion when he rejected the testimony of plaintiffs' expert. However, the trial judge's conclusion that Dr. Andrulis' comparison of older employees in one job group with older employees in another necessarily could *not* prove age discrimination is consistent with his duty to decide if the evidence is such that *reasonable* minds could differ as to its import. If Dr. Andrulis had testified that he believed that one and one equals three, the jury would not have been free to accept this obviously erroneous opinion.

Plaintiffs cite the opinion in *Borras v. Sea-Land Service, Inc.*, 586 F.2d 881 (1st Cir. 1978), as support for their contention that the trial judge's assessment of the testimony of Dr. Andrulis was improper. The *Borras* decision, however, is clearly distinguishable. In *Borras*, the trial court rejected the opinion given by plaintiff's expert. By contrast, in this case, the trial judge faulted the clearly erroneous methodology used by Dr. Andrulis (*i.e.*, the comparison of the treatment of older employees with other older employees) and the opinion resulting from it.

A decision which is more relevant to the issues presented by the instant case is *EEOC v. Federal Reserve Bank of Richmond*, 698 F.2d 633 (4th Cir. 1983), *rev'd*

on other grounds, 467 U.S. 867 (1984). In that case, which involved allegations of race and sex discrimination in employment, the district judge found in favor of plaintiffs. The Fourth Circuit reversed, finding, *inter alia*, that the trial judge had erred in accepting the opinion of plaintiffs' expert statistician because his ". . . opinion rested on such skewed analysis and . . . disregarded the far more reliable tables . . . which demonstrated no basis for finding of statistical significance, much less legal significance." *Id.* at 661-62.

CONCLUSION

For all of the reasons stated in the petition and in this reply brief, the petition for writ of certiorari should be granted.

/s/ Dona S. Kahn

June 1, 1988

Dated

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